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ARTICLES

“NOT JUST FOR THE FUN OF IT!”: GOVERNMENTAL RESTRAINTS ON BLACK LEISURE, SOCIAL INEQUALITY, AND THE PRIVATIZATION OF PUBLIC SPACE*

REGINA AUSTIN**

I. INTRODUCTION

I cannot imagine any conception of the black good life that does not allow for a fair measure of leisure. Unfortunately, our legal system has a long way to go before blacks will be able to pursue leisure on a just and equal footing with whites. This is all the more true because leisure discrimination and segregation as such have not really been important concerns of black law reform efforts.

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Of all the activities in which ordinary, law-abiding black folks engage, leisure pursuits may be the most heavily policed and the most broadly restrained. I am not speaking figuratively; I am speaking literally. Not only is there in place a privately enforced scheme of norms that aims to ensure that blacks conduct themselves, if at all, with propriety and decorum in places of leisure, but state power is also extensively employed to restrict where, when, and how blacks may pursue amusement, entertainment, and recreational activities. Though leisure is generally associated, however erroneously, with freedom from toil, choice of pursuits, and self-fulfillment,¹ many blacks, particularly young ones, cannot possibly operate on such assumptions. For them, the cumulative impact of an extensive array of laws, regulations, and governmental action makes having fun hard work.

As used in this Article, the term “leisure” principally refers to activities that involve traversing and utilizing spaces open to the public (whether publicly or privately owned) for the purpose of engaging in pleasurable, generally nonwork-related or after-hours pursuits, many of which entail the sort of face-to-face interaction that carries the potential for identity group formation and political mobilization. Leisure, so defined, takes place in a variety of public venues, ranging from live-performance spaces like concert halls and clubs, to participant sports venues like skating rinks and basketball courts, to public streets that are suitable for strolling, cruising, playing, parading, partying, or simply moving about.²

Governmental restraints on blacks’ leisure activities in such public places take many forms. A leisure restraint or constraint, in general, is “any factor that affects leisure participation negatively, either in terms of preventing participation, reducing the frequency, intensity or duration of participation, or reducing the quality of [the] experience or satisfaction

1. See generally DAVID L. JEWELL, *REFLECTIONS ON LEISURE, PLAY, AND RECREATION* (1997) (compiling various views on the benefits of leisure by noted scholars and intellectuals in the area of leisure studies).

2. There is a plethora of public leisure venues in which governmental restraints of one sort or another might operate to limit black leisure. The categories of places considered in researching this Article include the following: live-performance concert halls, auditoriums, theaters, and clubs; movie theaters; spectator sports venues like ballparks, stadiums, and race tracks; participant sports venues like swimming pools, tennis courts, skating rinks, golf courses, basketball courts, baseball diamonds, fields, and gymnasia; casinos, arcades, and amusement parks; restaurants, bars, clubs, dance halls, cabarets, and other dining, drinking, and dancing facilities; museums; libraries; public parks, beaches, waterways, zoos, botanical gardens, recreation centers, playgrounds, and campgrounds; public streets; and stores and shopping malls.

gained from [a leisure] activity.”³ A governmental restraint on leisure is one that arises from law, regulation, or the actions of local, state, or national governmental officials charged with developing and implementing public policy in such diverse areas as recreation, public works, licenses and inspections, traffic control, and policing. The restraints may be the result of direct control by the government over spaces that are publicly owned. For example, black leisure has been restrained by cities that have refused to rent public auditoriums for rap music or reggae concerts.⁴ Alternatively, the restraints may arise indirectly from the application of regulations promulgated under the police power to privately owned places of recreation, amusement, and entertainment; such is the case when local authorities refuse to license a bar or restaurant that caters to a black clientele.⁵ Finally, the restraints may operate not on a leisure activity itself, but on the mobility required to engage in the activity. For example, the routing patterns of some urban public transportation systems deliberately make it difficult for central-city residents to get to outlying leisure venues like shopping malls and beaches.⁶

Most frequently, governmental restraints on blacks’ public leisure are justified in the name of curbing or controlling crime, violence, aggression, or social irresponsibility or incivility. Blacks at leisure, however, have become so over-identified with such negative behavior that the association should be widely acknowledged to be a stereotype. Although governmental restraints in general admittedly paint black leisure with too broad a negative brush, it nonetheless seems difficult to distinguish between legitimate efforts to enforce reasonable limits on behavior in public leisure venues that happen to pertain to blacks and illegitimate attempts to exclude blacks as blacks from participation in an important realm of public interaction and discourse. Since some restraints must be imposed, it is important to consider how legislators, bureaucrats, courts, and even the police might identify and minimize the unwarranted suppression of black leisure.

In an effort to advance the inquiry regarding the propriety of state-created and state-enforced obstacles that are thrown in the way of black leisure, this Article explores the impact that the social inequality of blacks might have in generating such regulation. This Article maintains that

3. KARLA A. HENDERSON, M. DEBORAH BIALESCHKI, SUSAN M. SHAW, & VALERIE J. FREYSINGER, BOTH GAINS AND GAPS: FEMINIST PERSPECTIVES ON WOMEN’S LEISURE 195 (1996).

4. See *infra* note 14 and accompanying text.

5. See *infra* notes 20-22 and accompanying text. Nonenforcement of public accommodation laws implicates the state in the leisure discrimination perpetrated by privately owned places of amusement, recreation, or entertainment, but that is not the focus of this Article.

6. See *infra* Part II.A.6.

some governmental restraints are tainted by biases linked to the assumption that leisure, even when undertaken in a publicly owned place, is a private or personal (if not intimate) social activity. As a result, the generally low social standing of blacks as workers, leisure seekers, and human beings makes them undesirable sharers of leisure spaces and justifies the extensive legal control and supervision of their public leisure activities. The private nature of leisure is manifested in law and regulation that ensure that even publicly owned leisure venues are "privatized" by restricting blacks' access to, or freedom in, such venues, as opposed to the venues' being "democratized" by requiring and facilitating blacks' inclusion therein.

Moreover, governmental restraints very often ignore the significance of public leisure to blacks and underestimate the harm restraints cause. This shortsightedness is one in which even some blacks share. Leisure is, for many blacks, a site of struggle against structures of white, bourgeois, and male supremacy. It is an arena in which the fight for social equality is waged. For example, when blacks fight local authorities in order to hold parades and street celebrations in the face of white opposition, as did the organizers of Philadelphia's Odunde Festival and Brooklyn's Caribbean Day Parade,⁷ they are asserting their claim to participate fully and equitably in the symbolic economy. Moreover, governmental restraints on black leisure allocate public resources and accordingly determine the extent to which blacks will participate in an important material economic realm. Finally, leisure is an industry, a source of jobs, and an important area of entrepreneurship.

Of course, one person's leisure is another person's lament. Though hardly monolithic, most blacks are unlikely to undertake a public campaign to open or democratize public leisure venues so that more blacks will be able to smoke marijuana in public or frequent strip clubs in their own neighborhoods. Black leisure regulation produces tensions among groups of blacks that have differing concerns about civility, aesthetics, security, racial solidarity, and supplying ammunition to the enemy. To some extent, debates about the beneficial or virtuous nature of some forms of black public leisure pit the black bourgeoisie against the black lower classes. The struggle among blacks over the social and material significance of the myriad forms of black public leisure is as inevitable as the struggle between blacks and the general society over governmental oversight and control of black leisure.

7. See *infra* note 39.

Notwithstanding the lack of unanimity among blacks regarding what is and is not wholesome leisure, the defense of black leisure is an essential part of a legal praxis for the achievement of the good life for the mass of black people in this country. The very idea of "a black good life" may be threatening and dangerous to some whites (and no doubt to some blacks as well), because it suggests a shirking of social responsibility, an avoidance of moral accountability, or the appropriation of material resources that blacks do not deserve. But the black good life should not be confused with the high life, good times, or manna from heaven all rolled into one. An absolutely essential component of the black good life is the greater inclusion of blacks in the realms of production and commerce.⁸ The black good life is dependent upon the creation and maintenance of markets and audiences for the products of black energy, creativity, and resourcefulness, over which blacks must have some control. Opening up blacks' access to leisure is a crucial component of expanding the black public sphere.

Blacks, of course, are not the only group of people subject to leisure-related discrimination, segregation, and harassment. Latinos, Asian-Americans, Native Americans, members of various white ethnic minorities, white women, poor whites, lesbians, gay men, and the physically and mentally disabled all experience some of the sorts of treatment this Article addresses.⁹ Moreover, complete and nuanced treatment of the barriers to leisure participation and the leisure preferences of such black subcultural groups as women,¹⁰ lesbians and gays,¹¹ or prison inmates¹² is rare indeed and unfortunately this study will not do much to alleviate the scarcity. The burdens that race adds to the obstacles to leisure faced by those who are considered outsiders or deviants for other reasons is a subject that merits thoughtful study. It is hoped, though, that by seriously addressing the subject of legal impediments to blacks' leisure in this Article, leisure will

8. See Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 UTAH L. REV. 147, 164.

9. See Carol Brooks Gardner, *Out of Place: Gender, Public Places, and Situational Disadvantage*, in NOWHERE: SPACE, TIME AND MODERNITY 335, 336 (Roger Friedland & Deirdre Boden eds., 1994).

10. See GO GIRL!: THE BLACK WOMAN'S BOOK OF TRAVEL AND ADVENTURE (Elaine Lee ed., 1997) (recounting the leisure experiences of black women in various venues in the United States, nations of the African diaspora, and the world).

11. See Kendall Thomas, *Going Public: A Conversation with Lidell Jackson and Jocelyn Taylor*, in POLICING PUBLIC SEX 55 (Dangerous Bedfellows eds., 1995) (discussing the difficulties of creating public sexual spaces for black lesbians and gays in New York City).

12. See James H. Frey & Tim Delaney, *The Role of Leisure Participation in Prison: A Report from Consumers*, 23 J. OFFENDER REHABILITATION 79, 87-88 (1996) (delineating gaps in the social science literature pertaining to leisure in prisons, including the role of race in preference formation).

become an important area of legal inquiry and the leisure opportunities of other groups will be improved as well.

In the discussion that follows, this Article will first outline the contours of the governmental regime that controls and limits black public leisure. It will consider a concrete case that illustrates the ease with which leisure restraints are justified and the difficulties blacks must surmount in order to challenge them. Next, it will suggest how notions of social inequality justify the extensive regulation of black leisure and critique the assumptions on which black social inequality in the leisure area are based. It will then consider why black leisure should be placed higher on the list of concerns that merit organized political attention and sustained legal attack. Finally, it will offer some standards for determining if a governmental restraint on black leisure is inappropriate.

II. THE NATURE OF GOVERNMENTAL RESTRAINTS ON BLACK LEISURE

A. CATEGORIES OF RESTRAINTS

The variety of governmental actions employed to restrict black leisure is quite broad. The following discussion catalogues specific instances in which governmental restraints have been applied to black public leisure in ways that black leisure seekers have found objectionable. The restraints are divided among six categories: restrictions on access to publicly owned venues, discriminatory regulation of privately owned venues, curfews, anticruising regulations, the policing of mass public gatherings, and discriminatory regulation of transportation and the transportation infrastructure.

Though many restraints are mandated by ordinances and regulations, more of them surely result from the exercise of bureaucratic and front-line or street-level discretion. The discussion that follows concentrates on the former type of restraints because it is far easier to document than the latter category. In nearly every case or situation cited below, however, the applicable law or ordinance was facially neutral though its impact was felt exclusively or disproportionately by blacks. The restraints were imposed on blacks by both white-controlled and black-controlled local governments. Thus, some of the defenders of the restraints were black as well. Also, some of the restrictions were the subject of legal challenges in the courts on various grounds, but rarely on the basis of racial or class discrimination.

1. *Restricted Access to Publicly Owned Venues*

Discrimination in the siting of publicly owned leisure venues like parks, recreation centers, and pools, and disparities in the maintenance and staffing of facilities located in minority and poor enclaves are well-recognized phenomena.¹³ In addition, blacks have been denied access to existing publicly owned leisure venues as a result of the exercise of discretion by local authorities. For example, local authorities in a number of jurisdictions, allegedly concerned about violence, have refused to rent or permit blacks to use public spaces like auditoriums, coliseums, and meeting halls for hip-hop or rap concerts or dances, or have imposed such onerous insurance and security requirements for doing so as to effectively foreclose use of the spaces for such events.¹⁴

Similarly, public parks in several black communities have been closed or threatened with closure, sometimes for reasons of public safety or fiscal necessity, and sometimes because the white-controlled local government found more profitable uses for the land.¹⁵ A prime example of this is Franklin Park in Columbus, Ohio, which was closed to make way for AmeriFlora '92, the local celebration of Christopher Columbus' "discovery" of America.¹⁶ AmeriFlora, alas, was not a great success.

Use of public facilities, particularly playgrounds, beaches, and basketball and tennis courts, is sometimes limited to those who reside in the jurisdiction. Residency restrictions are usually justified on the ground that the residents who paid the taxes and fees used to build and maintain a facility should have priority in using it. This rationalization for turning public space into quasi-private space neutralizes any race or class discrimination that may have kept blacks from becoming members of the community in the first place. Security is also cited as a concern in some instances.

13. See, e.g., Monte Williams, *Center for the Elderly Exposes Racial Tensions*, N.Y. TIMES, Mar. 10, 1996, at A3 (discussing controversy over the building of a senior citizens' center in a white neighborhood not served by public transportation when an adequate facility already existed in a black neighborhood).

14. See TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 124-145 (1994) (recounting instances in which venues were foreclosed to rap concerts and explaining how the restraints were supported by the contextualization of black crime and the construction of black youth as "a permanent threat to the social order").

15. See Brian C. Little, Editorial, *Closure Is Not the Cure for All Ills*, RICH. AFRO-AM. (Richmond, Va.), Apr. 26, 1995, at A4 (expressing concern about the closing of a basketball court when other facilities are closed or overcrowded); John H. Manor, *Keeper of the Flame: Maheras Park; Now and Then*, MICH. CHRON., Mar. 12, 1996, at 1B (discussing a black recreational area threatened by residential development).

16. See Raymond L. Smith, *Hundreds Protest AmeriFlora '92's Grand Opening*, CALL & POST (Columbus, Ohio), Apr. 23, 1992, at 1A; CLAIMING OPEN SPACES (Urban Garden Films 1995).

Because they apparently look “out of place,” blacks who attempt to use facilities in white-dominated enclaves and poor and working class blacks who attempt to use facilities in black bourgeois enclaves bear the brunt of the policing needed to enforce residency requirements effectively.¹⁷

Residency requirements have generally passed judicial review, though property concepts like the public trust doctrine (as opposed to a civil rights framework) have been effective in some instances in keeping public leisure venues open to nonresidents.¹⁸ In a real departure, two Michigan courts ruled that the City of Dearborn had gone too far when it restricted access to two parks to residents and their guests, mandated that park users produce identification proving residency upon request, and made violating the ordinance a misdemeanor.¹⁹ Because of its disparate impact on blacks, the residency restriction was held to violate the provision of the Michigan Constitution prohibiting racial discrimination against individuals exercising their civil rights, while the provision authorizing police and recreation department employees to require park users to stop and show proof of residency violated the prohibition against unreasonable searches and seizures.

2. *Discriminatory Regulation of Privately Owned Venues Under the State's Police Power*

If a venue is privately owned, the state may have expansive authority to oversee the venue's business under licensing laws, zoning ordinances, antinuisance provisions, fire and safety codes, and other exercises of the police powers. As a result, there are myriad ways in which the state can

17. For example, the virtually all-black, middle-class Perrywood community of Upper Marlboro, Maryland, became concerned about the number of nonresidents who used its new full-sized basketball court in the evenings. See Susan Saulny, *On the Inside and Looking Out: Black Suburb Rebuffs Uninvited Black Visitors*, WASH. POST, July 8, 1996, at A1. Because the basketball court was becoming a hangout and an eyesore, and because there had been some break-ins and vandalism, the homeowners association hired off-duty Prince Georges County police officers “to stop people at the court and ask for some proof that they ‘belong in the area.’” *Id.* Some residents were concerned that a black community like Perrywood was singling out young black men the way the rest of society does. Of course, the attempt at identifying and excluding outsiders ensnared some local residents who said they did not mind the intrusion because the effort to make the community safer and to protect property values was worthwhile. See also Wiley A. Hall, *That Darn Little Basketball Court*, BALT. AFRO-AM., July 13, 1996, at A1 (commenting on the dilemma that basketball courts pose for middle-class suburban blacks).

18. See generally Marc R. Poirer, *Environmental Justice and the Beach Access Movement of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996) (comparing the approaches of beach access proponents in two states who chose between asserting property, race, and class-based arguments, and engaging in litigation and grassroots protests).

19. See NAACP v. City of Dearborn, 434 N.W.2d 444 (Mich Ct. App. 1988).

discriminate against black leisure through regulation.²⁰ For example, bars, clubs, and restaurants that are black-owned or that cater to a black clientele have allegedly been denied licenses to operate, forced to close because of license infractions, or subjected to extraordinary police surveillance under circumstances that proprietors believe are motivated by discriminatory hostility to black leisure pursuits.²¹ Local officials, on the other hand, point to threats to public health and safety and breaches of the peace as the basis for their actions. It appears, though, that claims of discriminatory regulation of leisure businesses are rarely litigated.²²

Of course, the effort to restrict the activities of black bars, clubs, and restaurants is not limited to those located in areas controlled by whites. Black communities (many of which are saturated with liquor sales outlets

20. A classical example of discriminatory regulation is the subject of PAUL CHEVIGNY, *GIGS: JAZZ AND THE CABARET LAWS IN NEW YORK CITY* (1991). Chevigny details how the cabaret zoning and licensing laws, which limited the number of musicians a cabaret could present and the instruments they could play, were directed at repressing the live performance of jazz which was associated in the minds of municipal authorities and state legislators with "wildness" and "moral degradation." See *id.* at 54-57. The licensing requirements pertained not only to establishments, but to artists as well. Thus, Billie Holiday could not obtain a license to perform in New York City following a conviction for drug possession. See *id.* at 59-60.

21. The story of the demise of Cafe Kilimanjaro in the Adams Morgan section of Washington, D.C., seems fairly typical. See Ken Ringle, *The Woes of Kilimanjaro*, WASH. POST, Sept. 25, 1995, at B1. The Kilimanjaro opened in 1982 as a dance club playing largely world music and catering to an African and Caribbean inunigrant clientele. The club proved highly successful using this format, but over time two things changed. At least one night a week the entertainment featured go-go bands which attracted a younger, more local crowd. At the same time, the neighborhood gentrified and the new residents complained to the authorities about the noise, litter, public urination, and general rowdy conduct of the Kilimanjaro customers. The club lost its liquor license after there was a shooting on the dance floor and it served liquor to underage undercover officers. The owners of the club blamed their troubles on the fact that they were black, foreigners, and the objects of vendettas because of their success. See also Frank Owen, *Crackdown in Clubland: City Hall Is Changing the Rules of Nightlife in New York*, VILLAGE VOICE, Feb. 18, 1997, at 34, 35 (reporting that one club promoter was told by a police officer not to hold hip-hop nights because blacks were not wanted in the neighborhood, while hip-hop patrons at another establishment were subjected to a roadblock and vehicle searches).

22. See *Webb v. Missouri*, 975 F.2d 867, No. 92-1009, 1992 WL 232478, at *1 (8th Cir. 1992) (per curiam) (denying leave to file a third amended complaint because allegations that a Sunday liquor license was denied because the plaintiff-applicant's "physical appearance and skin color appears to be that of the Black race" came too late); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600 (9th Cir. 1986) (holding that a claim that the loss of a bar's liquor license resulted from the racially discriminatory harassment of the San Jose police force was not precluded as to the municipal defendants by earlier state proceedings involving the liquor control board); *K.G.S., Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1005 (D.C. Ct. App. 1987) (holding that a control board member's improper questioning of a witness about the race and residency of a restaurant's patrons was not reversible error since the testimony was not relied on by the board). See also *City of New York v. Simithis*, 696 F. Supp. 939 (S.D.N.Y. 1988) (rejecting an effort by the white proprietor of a Times Square sex shop/peep show largely patronized by young black and Hispanic males to have a public nuisance abatement proceeding removed to federal court on grounds that the city's actions were racially motivated).

of one sort or another) have also sought the closure of nuisance establishments whose patrons are said to be responsible for noise, loitering, violence, underage drinking, and drug dealing.²³

3. Curfews

Juvenile curfew laws typically require that young people under 18 be at home between a certain hour at night (usually no later than 11 p.m. on weeknights and slightly later on weekends) and daybreak or sunrise.²⁴ The laws vary with regard to the consequences following violation. In some jurisdictions, responsibility for infractions falls on the parents who may be fined or ordered to take parenting classes.²⁵ In some jurisdictions, the youthful curfew violators are not formally arrested, but are taken to a drop-off center where they must be picked up by a parent or guardian.²⁶

Efforts to challenge juvenile curfews under the U.S. Constitution have produced a few victories and a few losses.²⁷ Courts that accept the fairly

23. See Sherry Stone, *Weary Neighbors Promised Relief from "Nuisance Bars,"* PHILA. TRIB., Sept. 29, 1992, at 3D. Liquor stores, convenience stores, and takeout shops that sell beer and liquor have also been the targets of organized black community protests. See also Sandy Hamm, *North Side, Friendship Areas Unite to Block 7-Eleven Sale of Beer,* NEW PITT. COURIER, Sept. 15, 1993, at A1; *Neighborhood Rights*, L.A. SENTINEL, Apr. 7, 1994, at 4A (praising the outcome of *Korean American Legal Advocacy Found. v. Los Angeles*, 28 Cal. Rptr. 2d 530 (Cal. Ct. App. 1994), on the grounds that it affirmed the right of citizens to determine what businesses operate in their communities by holding that the city could employ its land use authority in the aftermath of the 1992 riots to curb retail sales of liquor); Shelley Ross Saxer, *"Down with Demon Drink!": Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123 (1994) (analyzing various devices, including local public regulation, private nuisance actions, and community activism, by which the adverse impact of liquor stores can be minimized). But see Sherry Stone, *As City Cracks Down, Asian Deli-Owners Claim Discrimination*, PHILA. TRIB., March 17, 1995, at 3A (reporting on claims of selective enforcement of an ordinance limiting liquor sales to 25% of a take-out restaurant's business).

24. See generally William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347 (1995) (reporting the results of a 1992 survey of 77 cities with populations in excess of 200,000). Some shopping malls have also instituted curfew-like policies that ban young people under 16 from the premises after 6 p.m. unless they are chaperoned by a parent or adult over 21. See Robyn Meredith, *Big Mall's Curfew Raises Questions of Rights and Bias*, N.Y. TIMES, Sept. 4, 1996, at A1 (discussing policy adopted by the Mall of America, the nation's largest shopping center, and its impact on the predominately minority youth who frequent the mall on weekend evenings).

25. See Jessica McBride, *City Citations for Curfew Violations Soar*, MILWAUKEE J. SENTINEL, Dec. 8, 1997, at 1 (reporting that parents issued tickets for children's curfew violations are not paying up); Nathaniel K. Wiles, *City Curfew: Will It Work?*, NEW PITT. COURIER, Apr. 20, 1996, at A1 (describing Pittsburgh's Parental Responsibility Curfew Ordinance, which imposes fines up to \$300, 100 hours of community service, and/or parenting classes for parents whose children violate the curfew law).

26. See Deepak Karamcheti, *Curfew Center Up and Running*, NEW PITT. COURIER, Jan. 25, 1997, at A1 (describing services offered at a Pittsburgh curfew center).

27. Compare *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (finding curfew law adopted in 1947 unconstitutional), and *Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C.

standardized justifications advanced in support of curfew laws uphold the provisions. Statistical data indicates that juvenile violence is on the rise. If teenagers are at home (or at least off the streets) and not "hanging out" together in public, it is assumed that they will not engage in criminal behavior or become crime victims themselves. Juveniles are deemed to be more vulnerable to the many well-recognized dangers of the night than adults. Moreover, late-night activities interfere with sleep and academic performance. Juveniles are also inexperienced decisionmakers, and therefore need parental guidance. Curfews are intended either to reinforce parental authority or to compensate for lax parental oversight. The laws generally make exceptions for some activities, such as those necessitated by emergencies or employment, or undertaken for a parent or in the presence of a parent, or supervised by an adult and sponsored by a school, religious organization, public agency, or civic organization. Adult-supervised social activities are exempted because they are deemed to be wholesome endeavors that produce well-rounded children.

Curfew opponents see the matter differently and have convinced several courts to overturn curfew laws. The opponents assert that curfew laws interfere with parental discretion and infringe young people's rights to mobility and free expression. In addition, the goals of juvenile curfews can be accomplished with generally applicable prohibitions aimed at specific disruptive behavior like trespassing, loitering, and drunk and disorderly conduct. As a policy matter, governmental entities desirous of channeling young people into more constructive activities should create alternative programs and facilities for leisure and recreation rather than rely on curfews.

Curfew laws have been enacted and enforced in a number of localities, both white- and black-controlled, in the face of claims that such measures subject black youth to disproportionately greater police surveillance and arrest.²⁸ There is heightened concern among many blacks that curfew laws focus on status (a child's age and location) rather than on be-

1996) (holding curfew ordinance in violation of the due process and equal protection rights of minors and the Fifth Amendment rights of their parents), *with* *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993) (rejecting parents' challenge of a curfew law enacted by Dallas, Texas), *and* *Schleifer v. City of Charlottesville*, 963 F. Supp. 534 (W.D. Va. 1997) (upholding a curfew ordinance while arguing that *Hutchins* was wrongly decided).

28. See Sandy Hamm, *Udin, NAACP Oppose Teen Curfew Bill*, NEW PITT. COURIER, Sept. 30, 1995, at A1 (reporting on black opposition to a curfew law on the grounds that it was "impractical and inappropriate"); Barrington Salmon, *Curfew Set to Start Jan. 1*, MIAMI TIMES, Dec. 28, 1995, at 1A (reporting on concerns about a curfew's impact on blacks and a brochure intended to instruct young men on how to minimize conflict when stopped by the police for curfew violations).

havior; thus, curfew enforcement may potentially sweep into the net of the juvenile justice system good kids and troublemakers alike. Poorer urban minority young people are particularly at risk. Many seek leisure outside their homes and in public places because they do not have basements, backyards, or other safe private spaces to use; the streets are their chief recreation and socializing venues. Poorer minority youth may also be in public late at night because leisure sites like movie theaters and dance clubs are beyond their residential communities, and public transportation is their chief means of travel. Finally, social events involving minority youth may start late because of either cultural preferences stemming from a long history of blacks' recreating late at night after whites are safely out of the way, or material necessity associated with patterns of youth employment.

A claim of disparate racial impact was raised in *Ashton v. Brown*²⁹ to challenge the curfew law enacted by Frederick, Maryland. However, the court did not reach the issue because it found the ordinance unconstitutionally vague. The stated facts suggest that the black female plaintiffs were detained during an enforcement sweep that resulted exclusively in the arrests of patrons of a restaurant where blacks went to dance and listen to live music, particularly hip hop.³⁰ Furthermore, Frederick arrest records indicated that "the proportion of African-Americans arrested for curfew violations was substantially greater than the proportion of African-Americans to the population at large."³¹

Sometimes a curfew is imposed on the activity in which blacks participate, rather than on the participants themselves. For example, the suburban Boston community of Dedham, Massachusetts, effectively banned sizable numbers of blacks from attending "midnight movies" in the town by placing a restriction on movie theater operations between the hours of 1 a.m. and 6 a.m.³² This restraint, which withstood constitutional review, will be discussed more fully below.³³

29. 660 A.2d 447 (Md. 1995).

30. Three other establishments on the same street that presumably catered to whites were supposedly targeted as well. See *id.* at 453-54.

31. *Id.* at 453 n.5

32. See *National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023 (D. Mass. 1994), *aff'd*, 43 F.3d 731 (1st Cir. 1995).

33. See *infra* Part II.C.

4. *Anticruising Regulations*

A number of jurisdictions have enacted ordinances in an attempt to curb cruising in automobiles as a form of black leisure.³⁴ The ordinances take various forms. For example, in an effort to control the weekend gathering of young minority people at a popular lakeside spot, Oakland, California, enacted an ordinance which prohibited passing between two designated checkpoints twice in four hours.³⁵ Norfolk, Virginia, on the other hand, charged a \$1-per-car fee for entry to Northside Park, a prime cruising venue for blacks.³⁶

Anticruising ordinances are generally justified on the grounds that they reduce traffic congestion, noise, and pollution; increase highway safety; ensure the free movement of emergency vehicles; and lessen criminal behavior, including drunkenness and disorderly conduct. However, anticruising ordinances have been challenged on constitutional grounds because they impact the right to travel. The results have been mixed.³⁷

34. The overall impact of anticruising laws may be greater on Latino youth than black youth because of the cultural significance of lowrider cars, and on white youth than on minority youth in general because car ownership is greater among whites than among minorities. For a city's unsuccessful efforts to restrict lowriders, see Carl Hilliard, *Legislation Giving Police the Power to Stop Cars . . .*, A.P. POL. SERV., January 20, 1998, available in 1998 WL 7377703; Dan Luzadder, *Committee Throttles Cruising Bill House Panel Rules Cities Should Have Authority to Handle Such Issues*, ROCKY MOUNTAIN NEWS (Denver), January 20, 1998, available in 1998 WL 7924369.

35. See Rick DelVecchio, *Cruising Crackdown Considered; Oakland Hopes to Trim Lake Merritt Crowds*, S.F. CHRON., Apr. 19, 1995, at A15; Venise Wagner, *Uneasy Calm Around the Lake*, S.F. EXAMINER, Apr. 24, 1995, at A4; *Oakland Beefs up Cruising Ordinance*, S.F. CHRON., Apr. 20, 1995, at C7. See also Thom Gross, *Exemptions for Parks Put Brakes on Cruising Measure*, ST. LOUIS POST-DISPATCH, July 22, 1995, at 3B (exemption of park roads from anticruising measure that would have affected primarily black youth prompts its defeat).

36. See *Norfolk Has Right to Curb Abusers of Its Parks; Keep the Anti-Cruising Fee*, VA.-PILOT (Norfolk), Apr. 18, 1995, at A10.

37. Compare *Lutz v. City of York*, 899 F.2d 255 (3rd Cir. 1990) (finding anticruising ordinance to be a reasonable time, place, and manner restriction on the right to intrastate travel), and *Brandmiller v. Arreola*, 544 N.W.2d 894 (Wis. 1996) (upholding nearly identical anticruising ordinances passed by a number of municipalities), with *Minnesota v. Stallman*, 519 N.W.2d 903 (Minn. Ct. App. 1994). In *Minnesota v. Stallman*, the Court of Appeals ruled that an anticruising ordinance infringed the right to travel because it was not narrowly tailored to achieve its objectives in that it made no exception for passage through the no-cruising zone for legitimate personal or business purposes except deliveries. Furthermore, the ordinance was vague in that drivers were not informed of the cruising zone's boundaries, the location of the traffic control points, or precisely what conduct constituted cruising. The ordinance in question prohibited driving past a traffic control point three or more times between 9 p.m. and 2 a.m. The perimeters of the no-cruising zone and the traffic control point were not designated in the ordinance. See *id.* at 905.

5. *The Policing of Mass Public Gatherings of Blacks*

As the anticruising ordinances suggest, urban streets and sidewalks are both pathways to and sites of leisure where blacks, informally gathered, may find themselves the subjects of extensive policing. The courts have done much (some would say too much) to limit the use of loitering laws as an excuse for the harassment of blacks on or in the streets by local police, but discretionary street-level law enforcement remains hard to control.³⁸

Public streets and sidewalks, as well as parks and beaches, are also prime sites for planned carnivals, festivals, parades, and holiday celebrations. Such formal gatherings of black people have, in some instances, either had little support from local authorities or prompted outright repressive governmental action.³⁹ In the recent past, for example, large

38. Blacks who stroll, ambulate, or just hang out on the sidewalk for purposes of leisure have been, in the view of many, unjustifiably stopped by police officers and unjustly restrained by loitering laws and nuisance abatement injunctions. See Terence R. Boga, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990). It has also been argued, on the other hand, that the striking down of fairly specific ordinances by the courts has gone too far and interferes with the ability of police to engage in community policing that impacts favorably on citizens' so-called "quality of life." See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 582 (1997).

Street vending, which allows sellers to set up shop wherever their mobile customers go for leisure, has also been restricted. See generally Regina Austin, "An Honest Living": *Street Vending, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994) [hereinafter Austin, "An Honest Living"].

39. See Lynda Lane, *Odunde Festival Returns to South Street*, PHILA. TRIB., June 7, 1996, at 6E; Sherry Stone, *Odunde Settles Its Fight with City Over Services*, PHILA. TRIB., May, 31, 1996, at 1A (discussing how the Odunde festival received city support after surviving various difficulties, including the imposition of costly vendor and permit fees, as well as an effort to relocate it from the newly gentrified neighborhood in which it had been traditionally held). For an analysis of the Odunde Festival, see Gerald L. Davis, "Will the Circle Be Unbroken?" *African American Community Celebrations and the Reification of Cultural Structures*, in JUBILATION! AFRICAN AMERICAN CELEBRATIONS IN THE SOUTHEAST 51 (William H. Wiggins, Jr. & Douglas De Natale eds., 1993).

Brooklyn's Caribbean Day Parade, which usually occurs over the Labor Day weekend, has also produced a history of conflicts between the organizers and the municipal establishment which has been represented at time by a massive police presence. See generally Remco van Capelleveen, *The "Caribbeanization" of New York City: West Indian Carnival in Brooklyn*, in FEASTS AND CELEBRATIONS IN NORTH AMERICAN ETHNIC COMMUNITIES 159 (Ramon A. Gutierrez & Genevieve Fabre eds., 1995) [hereinafter FEASTS AND CELEBRATIONS]. Tensions were high in the wake of the conflicts between blacks and Hasidic Jews surrounding the deaths in Crown Heights of a Caribbean-American child and a Jewish rabbinical student when the Labor Day weekend coincided with the Jewish holiday of Rosh Hashanah. See John Kifner, *Steel Drums and a Truce*, N.Y. TIMES, Sept. 3, 1991, at B1; Andrew L. Yarrow, *Brooklyn Prepares, and Braces, for a Parade*, N.Y. TIMES, Aug. 30, 1991, at B1. See also Garry Pierre-Pierre, *Compromise Prevails for Parade on Eve of Rosh Ha-shanah*, N.Y. TIMES, Sept. 4, 1994, §13 at 6.

congregations of black college students have lead to some notable confrontations between police on the one hand and collegiate participants and local troublemakers on the other.⁴⁰ Fearing the worst, other jurisdictions have tried to discourage such gatherings by being less than hospitable.⁴¹ Although the police have cracked down on unruly white college students, blacks maintain that where they are concerned the displays of force have been greater and the measures to curb antisocial behavior have been harsher.⁴²

6. *Discriminatory Regulation of Transportation and the Transportation Infrastructure*

For many blacks who do not reside near leisure venues, participation in recreation, entertainment, and amusement activities depends on public transportation (buses, trains, subways, and taxi cabs) and the public infrastructure integral to private modes of transportation (airports, bus stations,

Historically, there have been other instances in which local authorities and white citizens in general have impeded black public celebrations. See Genevieve Fabre, *Pinkster Festival, 1776-1811: An African-American Celebration*, in FEASTS AND CELEBRATIONS, *supra*, at 13, 16 (noting that the Pinkster festival was banned because of violence and whites' concerns about the symbolic freedom the festival represented); Shane White, "It Was a Proud Day": *African Americans, Festivals, and Parades in the North, 1741-1834*, 81 J. AM. HIS. 13 (1994) (recounting how a history of ridicule led to the demise of mid-year festivals like Pinkster in New York and New Jersey, and Negro Election Day in New England, and their replacement with more dignified and respectable parades by free blacks).

40. See *Ignoring Racial Issue Was Costly Error in Va. Beach*, WASH. POST, Sept. 18, 1989, at A1 (reporting that violence at a Labor Day weekend gathering of black college students led to 100 damaged businesses, 43 injured persons, and 260 arrests, half of whom were local residents).

41. See *Atlanta Frantic But Freakniks, They Just Want to Have Fun*, RICH. TIMES-DISPATCH, Apr. 19, 1995, at A16; Robert A. Jordan, "Freaknik" Freeze Warps Atlanta's Image, BOSTON GLOBE, Apr. 23, 1995, at 77 (reporting that many businesses intended to close during "Freaknik" and Mayor Campbell was being criticized for statements that seemed to discourage the event); Deborah Range, *Freaknik a Sign of Student Hostility*, TRI-STATE DEFENDER, May 3, 1995, at 3A (finding evidence of Atlanta's hostility to college students in its refusal to issue entertainment permits, banning of autos from residential areas and the city's main park, and the refusal to provide portable toilets); K. Dawn Rutledge, "Thoughts from the Editor": *If Atlanta Can't Handle Freaknik, the Olympics Might Be Out of Their League*, TENN. TRIB., Apr. 30, 1996, at 3 (alleging that hordes of police, blocked streets, and closed malls and public parks ensured that the students attending "Freaknik" in 1996 would have a miserable time). Philadelphia, on the other hand, has welcomed and planned for the annual Greek Picnic, which has occurred without major incidents. See Robert J. Vickers, *Philadelphia Gathering Holds Lessons for Freaknik; Brotherly Love—and a Little Planning—Work Wonders When This City Hosts a Collegiate Mega-Party*, ATLANTA J. CONST., July 12, 1993, at A1.

42. See Lynda Richardson, *Virginia Beach Panel Takes up Sensitive Task; Accounts of Labor Day Violence Reflect Divisions, Frustrations*, WASH. POST, Nov. 12, 1989, at C1 (discussing how the head of the local NAACP charged Virginia Beach with entertaining whites but attempting to control blacks). See also Rutledge, *supra* note 41 (alleging that black college students are singled out for special attention and criticism).

streets, highways, bridges, parking spaces, lots, and garages).⁴³ They also rely on the facilities that make being out in public and away from home comfortable, such as public lavatories, drinking fountains, and telephones.

In accord with a pattern established during the heyday of segregation,⁴⁴ public transportation continues to be routed in a way that makes it difficult for some blacks to get to and from leisure venues that more affluent or more mobile persons freely enjoy. A most shameful foreclosure of a leisure space through restrictions on transportation came to light following the death of Cynthia Wiggins, a teenaged mother from Buffalo, New York, who was an employee at a fast-food restaurant in a suburban shopping mall.⁴⁵ Ms. Wiggins rode to work from the inner city on the No. 6 bus, and like its other riders was required to cross a busy seven-lane highway and a parking lot to reach the mall. During winter, the crossing was made more treacherous by snow lining the sides of the highway. However, the owners of the Walden Galleria Mall refused to allow the No. 6 bus to stop on mall property because store operators did not want the business of young black and Latino customers who traveled on the bus, and the transit authority capitulated in the decision. Cynthia Wiggins was killed by a dump truck while making her way to work on a cold December day in 1995.

Passageways—roadways, streets, footpaths, and bridges—that link white communities and black communities have sometimes been blocked off in ways that not only offend blacks, but also restrict their access to sites of leisure.⁴⁶ The initiating communities justified the barriers on the

43. Discrimination with regard to leisure-related transportation received greater visibility with the publicity surrounding the death of Cynthia Wiggins. See *infra* note 45 and accompanying text. Publicity also centered around the complaints lodged against Avis Rent-A-Car and one of its Carolina franchisees who refused to lease vehicles to blacks. See Ellen Neuborne, *Ex-Avis Workers' Bias Complaints No Secret*, USA TODAY, Nov. 28, 1996, at 1A; Ellen Neuborne, *Ex-Workers Allege Track Record of Bias*, USA TODAY, Nov. 26, 1996, at 1B.

44. See *infra* notes 101-03 and accompanying text for a discussion of the efforts of Robert Moses to exclude blacks and working-class whites from Jones Beach on Long Island, New York.

45. See Bernice Powell Jackson, *Civil Rights Journal: In Memory of Cynthia Wiggins*, SUN REP. (San Francisco), Mar. 21, 1996, at S2. See also *A Tale of Two Cities*, SUN REP., Jan. 9, 1995, at 7 (reporting on the request of a Richmond, California, shopping mall that the transit authority move a bus stop to prevent alighting and boarding black students of a nearby school from blocking doorways and interfering with customers).

46. See Robert Grasmere, *Maplewood's "Wall" of Misunderstanding*, WALL ST. J., Dec. 22, 1993, at A10 (reporting that the mayor of Maplewood, a racially integrated town, supported erection of ornamental gates including one that faces Newark); Nancy Shields, *Prayers to Walk Freely and Proudly: Bridges that Divide*, ASBURY PARK PRESS, Apr. 1, 1996, at A1 (reporting that erection and nightly closing of gates over foot bridges linking the Ocean Grove religious shore community and Asbury Park, New Jersey, whose residents are predominantly black and Latino, was justified on the ground of crime prevention). See also Sue Epstein, *Belmar Bridge Closings, Road Restrictions Ques-*

grounds of traffic control, security, and community enhancement. For example, residents of the affluent, racially mixed Morningside section of Miami voted by a margin of 352 to 241 in July 1997 to install guard booths at two entrances and barricades on all other streets leading into their community as a way to reduce crime.⁴⁷ The proposal, which should cost each property owner roughly \$1,600 the first year and \$525 thereafter, caused concern because Morningside Park, a well-equipped, scenic waterfront park popular with blacks and Latinos from the neighboring communities of Little Haiti and Buena Vista, is located within the enclave.⁴⁸ When the structural barriers are installed, outsiders coming to the park may be stopped for evaluation and their license numbers recorded.⁴⁹ News reports suggest that black and white residents of Morningside and visitors to the park were on both sides of the debate over the racial and class implications of the proposal.⁵⁰ In opting to turn their neighborhood into a gated community, a majority of the residents who voted chose to pursue a course of action being adopted by an increasing number of established South Florida residential districts.⁵¹

Parking restrictions can impede black leisure as well. New York City parking regulations, for example, limit parking on public streets surrounding public beach areas in Queens during the peak beach-going season.⁵²

tioned by Black Leaders, STAR-LEDGER (Newark, N.J.), July 13, 1994 (discussing how a predominantly white beach town temporarily raised its drawbridge to limit the number of blacks coming from Greekfest 1994, an annual event held in Philadelphia's Fairmount Park).

47. See John Lantigua, *Morningside Votes to Put Up Guard Booths*, MIAMI HERALD, July 3, 1997, at B1.

48. See Don Finefrock, *Morningside Divided Over Guard Gates*, MIAMI HERALD, May 4, 1997, at B1 [hereinafter Finefrock, *Morningside Divided*] (describing the opposing views of the residents and park visitors regarding a referendum to close off the Morningside community); Karen H. Holness, *Plan for Gates Upset Morningside Neighbors*, MIAMI TIMES, Apr. 17, 1997, at A1 (describing the opposing views of some residents concerning the proposal to make Morningside the only one of Miami's guarded communities with a public park).

49. See Don Finefrock, *Dade Commissioners Let Morningside Residents Vote on Gates*, MIAMI HERALD, May, 7, 1997, at B3 [hereinafter Finefrock, *Residents Vote*]; Finefrock, *Morningside Divided*, *supra* note 48.

50. See Finefrock, *Residents Vote*, *supra* note 49; Morgan Winsor, *Morningside Decides on May 6 Whether to Construct Guard House*, MIAMI HERALD, Apr. 10, 1997, at Neighbors NE 3.

51. See Peter Whoriskey, *Urban Barricades What Do You Think? Gated Communities Are Changing the City Landscape*, MIAMI HERALD, Aug. 17, 1997, at L1 (reporting that, in the eight years prior to the date of the article, 27 existing Metro-Dade communities had become special tax district gated communities and five more were in the process of converting). See also David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995) (cataloguing the conflicts that arise between residential associations and nonmembers over the use of public space and public resources, and advocating a constitutional solution).

52. See Norimitsu Onishi, *Public Beach, Unspoiled by the Public*, N.Y. TIMES, Aug. 24, 1996, at 25.

The parking bans not only reduce traffic congestion and protect the environment, but also keep outsiders from using the beach, as does the 9 p.m. closing time and the lack of restroom facilities. According to a news report, nonresidents who use the beach despite the restrictions have few complaints, because the obstacles to access guarantee that only "a better class of people," not troublemakers and litterers, will use the land.⁵³ A resident who opposes the ban bluntly attributed it to her fellow residents' race and class xenophobia.⁵⁴ "And for some, she added, there is a class lower than the intruders in cars: the public transportation crowd—the radio-blaring boys and bikini-clad girls coming from Brooklyn on the A train and the immigrants descending from northern Queens on the Q-35 bus."⁵⁵

A more common form of leisure restraint is the policing that blacks encounter as they travel to and from, as well as traverse, leisure venues. Much of this policing arises from the exercise of discretionary power by individual police officers. Furthermore, some of the security profiles which supposedly channel that discretion have effectively targeted blacks as potential law violators and thereby triggered police stops, security checks, and surveillance on streets and highways, in bus and train stations, and in airports, which have adversely affected leisure travelers.⁵⁶ The constitutionality of police action based on such profiles is unclear.⁵⁷

B. THE IMPACT OF GOVERNMENTAL RESTRAINTS ON BLACK LEISURE

It is impossible to catalogue every kind of governmental restraint being employed to limit blacks' leisure pursuits today. State regulation of amusement, entertainment, and recreational facilities and activities is characterized by a great deal of local variation and discretionary decisionmak-

53. *Id.*

54. *See id.*

55. *Id.*

56. *See, e.g.,* Joyce Meggerson-Moore, *First-Person: Do You Fit the Profile?*, NEW PITT. COURIER, July 3, 1996, at A7 (describing how a black woman traveling between San Diego and Pittsburgh was followed and questioned by a state trooper on drug detail ostensibly because she paid for her ticket with cash, traveled with only carry-on luggage, and traveled on an overnight flight); Tony Snow, "Aggressive" Airline Checks Under Fire; Civil Rights Groups Damn Anti-Terrorist Measures, THE VOICE, March 3, 1997, at 14 (criticizing computerized profiling system adopted in the wake of the crash of TWA Flight 800).

57. *See* Charles L. Becton, *The Drug Courier Profiles: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417 (1987) (calling for limited use and no "after the fact" reliance on profiles); William R. O'Shields, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion: Florida v. Bostick and the Merits of Adopting a Per Se Rule Against Random, Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875 (1992); Joëi Sax, Note, *Drug Courier Profiles, Airport Stops and the Inherent Unreasonableness of the Reasonable Suspicion Standard After United States v. Sokolow*, 25 LOY. L.A. L. REV. 321 (1991).

ing. It seems reasonable to conclude though that, if more powerful actors object to where, when, and how blacks pursue their leisure opportunities, there is a panoply of measures that can be used to limit or control what blacks do.

By the same token, there is no real way to estimate the ubiquity of the restraints outlined above or their actual impact on blacks. It certainly cannot be directly proven that they are disproportionately applied to blacks. Discretionary or informal decisionmaking on the streets and in the offices of bureaucrats very likely has a greater impact on blacks' leisure than written laws and regulations, which are far easier to document. In addition, tangible governmental restraints produce ephemeral psychic constraints—the invisible boundaries that blacks do not cross because of their fear of meeting with a hostile reception.

It is doubtful that a value can be placed on the money wasted and the pleasure lost by blacks in their efforts to have fun or to avoid obstacles to leisure. However, sociological surveys of blacks' leisure preferences, demographic characteristics, and socioeconomic status suggest that governmental restraints in general may have a relatively more significant impact on black leisure than on white leisure. Survey data suggests that blacks prefer group-oriented sports and fitness activities (such as football, basketball, and baseball), and social/associational activities (such as dancing, socializing with friends and relatives, participating in clubs or voluntary associations, and going to church) to a greater extent than do whites.⁵⁸ Depending on the size, age, wealth, and geographic location of the group, these activities are likely to occur in public spaces that are publicly owned or subject to state regulation under the police power. The black population is younger, poorer and more urban than the white population.⁵⁹ One might imagine that public spaces would be the preferred leisure venues of lower-income urban adults who live in cramped quarters, children who need room to run, and seniors who like to congregate in places that are accessible, safe, and cheap. At the same time, surveillance and regulatory oversight of leisure is probably greatest in the streets, at public parks, pools, and playgrounds, and on public transportation systems—of all of which

58. See Myron R. Floyd, Kimberly J. Shinew, Francis A. McGuire & Francis P. Noe, *Race, Class and Leisure Activity Preferences: Marginality and Ethnicity Revisited*, 26 J. LEISURE RES. 158, 166, 169 (1994). Whites place high preference on individual outdoor leisure activities like swimming, bicycling, sailing, hunting, fishing, camping, and hiking. See *id.* at 166. This ranking was roughly the same for both white males and females. Black females, differing from their white counterparts, tended to favor socializing and associational activities, and sports. See *id.* at 169.

59. See DORIS WARRINER, *AFRICAN AMERICANS TODAY: A DEMOGRAPHIC PROFILE* 3-6, 37-39 (1996).

lower-income, black, urban dwellers are likely to be disproportionate users. It seems likely, therefore, that a greater share of black people's leisure time is spent in activities and venues that are the subject of governmental restraints.

Among those inordinately engaged in physical activity in public spaces and very likely to be disproportionately policed in the process are marginally employed black urban adolescent and young adult males, whose self-esteem is heavily dependent upon the affirmation they receive from leisure pursuits.⁶⁰ The equipment they play with, the clothes they play in, and the concept of the games they play appear to be the products of highly commercialized international leisure/entertainment industries with big names such as NBA, Nike, Champion, Disney, Nintendo, and McDonald's; but the products exist largely because of the ingenuity and creativity of their consumers. Black male youths' play itself entails active engagement with others in a physical way in a public place that is highly susceptible to policing by the state.

No inventory of governmental restraints or assessment of their impact on black leisure is likely to be complete until black leisure is viewed as an important integrated sphere of existence (like employment and housing), worthy of sustained and committed defense in the face of discriminatory and/or excessive state action. Thus, the disparate impediments thrown in the path of black leisure must be conceptualized as part of a systematic assault on a significant aspect of blacks' collective public life. The next section illustrates why the promotion or elevation of black leisure as a priority concern is so problematic.

C. A CASE STUDY: JUSTIFYING RESTRAINTS, EXPLAINING QUIESCENCE

In light of the categories of restraints imposed on black leisure and their potential impact, careful study of a case involving a governmental restriction may illuminate the justifications typically advanced in support of such limitations and the circumstances that make challenging them difficult. *National Amusements, Inc. v. Town of Dedham*⁶¹ not only illustrates the way in which blacks are assumed to be a source of disturbance and disruption in leisure venues, but also how blacks' stake in situations involving

60. It appears that young black males who do not work do achieve a measure of confidence and self-esteem from leisure, but leisure does not compensate for the lack of work. See Lisa C. Pesavento Raymond & John R. Kelly, *Leisure and Life Satisfaction of Unemployed North American Urban Minority Youth*, 14 SOC. & LEISURE 497, 505, 507 (1991).

61. 43 F.3d 731 (1st Cir. 1995).

leisure segregation and discrimination is confounded and obscured practically to the point of nonexistence.

In 1978, National Amusements' twelve-screen Showcase Cinemas complex located on Route 1 outside of Boston in Dedham, Massachusetts, began showing "midnight movies" on Friday and Saturday nights. The performances began between 11:30 p.m. and 12:30 a.m., and ended between 1 a.m. and 2:30 a.m. In 1989, a selectwoman raised concerns regarding traffic and security problems caused by the midnight movies at a meeting of the Board of Selectmen, the town's governing body. After being notified of the problems, National Amusement undertook "at its own expense, a variety of measures designed to enhance security, reduce noise levels, control traffic, and ameliorate the problem of litter."⁶²

Notwithstanding the actions of National Amusements, the citizens of Dedham voted at a town meeting to restrict the late-night operations of Showcase Cinemas. In November 1989, after enacting a measure that the state's attorney general concluded would not pass constitutional muster because it exempted ballroom dancing from its strictures, the citizens of Dedham passed Article 4, which provided that "no holder of a license issued by the Town of Dedham . . . shall permit any activity licensed thereunder to be conducted between the hours of 1:00 a.m and 6:00 a.m."⁶³ This police regulation, though general in scope, effectively applied only to Showcase Cinemas.

Claiming among other things that the bylaw violated the First Amendment's guarantee of freedom of speech, National Amusements challenged the ordinance in federal court. The trial court rejected its assertions and awarded Dedham a summary judgment. On February 18, 1994, ten days after the final judgment was entered against plaintiff, the midnight movies ceased. On appeal, the First Circuit affirmed the decision of the district court.

The courts' reasoning with regard to Dedham's governmental interest in adopting Article 4 is of particular interest. The town asserted that Article 4 was enacted to "preserve peace and tranquillity for Town citizens during the late evening hours."⁶⁴ The regulation was proposed in the wake of numerous complaints about "vandalism, trespassing, noise, and late-night traffic through residential neighborhoods (with accompanying dis-

62. *Id.* at 734.

63. *Id.* at 734-35.

64. *Id.* at 741.

ruption from headlight glare).”⁶⁵ The police chief also reported to the Board of Selectmen that numerous incidents had occurred after the late-night movies ended. The court rejected National Amusements’ counterargument that the complaints were groundless since some of the reported incidents never happened and others could not be attributed to the midnight movie audience. In addition to acknowledging the citizens’ grievances and the concerns of the constabulary, the court relied on the “commonsense realization that the placidity of a residential community will be jeopardized by an activity that regularly draws hundreds of late-night patrons, most in automobiles, who must depart in the early morning hours.”⁶⁶

National Amusements argued that Dedham’s asserted significant governmental interest was a sham and that the real ulterior motive for the regulation was to keep blacks out of Dedham late at night. According to a market research survey conducted for the plaintiff in the summer of 1993, 80% of the audience for the midnight movies was black compared to 30% of the audience for other screenings.⁶⁷ The theater’s manager estimated that the late-night movie audience had been predominately black since 1986.

The First Circuit found no merit in National Amusements’ claim. First, it asserted that there was “no evidence that any person involved in the passage of Article 4 was aware *at that time* of the racial composition of Showcase’s audiences.”⁶⁸ During the debate on Article 4, various selectmen and town citizens did refer to the patrons of the late-night movies as “these young kids, who don’t even live in Dedham,” the “nice little out-of-towners” and “the undesirable element that’s attracted by

65. *Id.*

66. *Id.* at 742. The reasoning of *City of Boston v. Back Bay Cultural Ass’n*, 635 N.E.2d 1175 (Mass. 1994), offers an interesting contrast to the Dedham case. In the Boston case, the Supreme Court of Massachusetts ruled that an ordinance restricting the operation of licensed places of entertainment between the hours of 2 a.m. and 6 a.m. violated the First Amendment of the U.S. Constitution. The ordinance was intended to eliminate the noise that emanates from “buildings providing entertainment; patrons gathering, entering or leaving; motor vehicles arriving or departing; and patrons traveling the city streets.” *Id.* at 1179. The court ruled that the ordinance was not narrowly tailored to fit its intended purpose because it applied to forms of entertainment that did not generate the type of noise the city legitimately wished to curb. *See id.* at 1180. However, the ordinance contained an exemption for movie showings that began by 12:30 a.m. and ended without interruption before 3 a.m. The court accepted the city’s argument that the exemption did not destroy the content neutrality of the ordinance because “unlike other forms of entertainment, patrons of motion pictures arrive prior to the start and remain until the conclusion of the picture; thus motion pictures do not infringe on the city’s interest in reducing noise during the early morning hours.” *Id.* at 1179.

67. *See National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 742-43 (1st Cir. 1995).

68. *Id.* at 743.

[Showcase's] activity.”⁶⁹ National Amusements read these assessments as “code words demonstrating ‘institutional racism.’”⁷⁰ The First Circuit, however, viewed the language as ambiguous at worst. The court reasoned, “[A]ll the evidence supports Dedham’s assertion that Article 4 was aimed principally at curbing late-night disruptions. Against this backdrop, the snippets that [National Amusements] has extracted from the record with near-surgical precision simply do not support an inference of racism on the part of the legislative body.”⁷¹

National Amusements also attempted to show that Article 4 did not allow it adequate alternative avenues of communication with a segment of its patrons. According to the consumer survey, 14% of those attending the midnight shows did so because they worked late and could only make the late shows, while an additional 11% “felt that the midnight show was the only entertainment option open to him/her.”⁷² Though the market research firm concluded that “the late [midnight] show is the only opportunity the Theater has . . . to communicate with a distinct portion of its patrons,”⁷³ the court reasoned that thwarting the idiosyncratic preferences of those who favor midnight movies did not constitute a denial of adequate avenues of communication. “As long as restrictions are content-neutral, some diminution in the overall quantity of speech will be tolerated.”⁷⁴

A close analysis of the material and social stakes of the parties involved in or impacted by the litigation is telling. The citizens of Dedham wanted their peace. Their complaints were taken at face value by the courts and “commonsense” was thrown in to lend its weight to the justifications supporting Article 4’s ban on early-morning entertainment. Furthermore, in advocating for the midnight movie ban, a Dedham select-woman stated that wholesome entertainment should be over by midnight or 1 a.m., and Article 4 would not prevent “healthy” entertainment that surely ended long before 3 a.m.⁷⁵ This point was surely not lost on the courts.

There is no indication in the opinion of what sort of people live in Dedham. According to the 1990 Census, there were only 88 blacks among

69. *Id.*

70. *Id.* (quoting appellant’s brief).

71. *Id.*

72. *Id.* at 745. The value of the survey’s findings were limited, however, because of ambiguities in the questions and responses.

73. *Id.*

74. *Id.*

75. Brief for Appellant at 13-14, *National Amusement, Inc. v. Dedham*, 43 F.3d 731 (1st Cir. 1995) (No. 94-1176).

the 23,782 residents of Dedham.⁷⁶ Whites constituted roughly 98% of the population and blacks, roughly .37%. The community's median household income in 1989 was \$45,687,⁷⁷ compared to a statewide figure of \$36,952.⁷⁸ Nonetheless, the complaints of the residents had an air of objectivity because they were not overtly racist. The court apparently did not find the bit of xenophobia that comes with residence in a solidly middle-class white suburb or the trace of snobbery that accompanies the respectability cultivated by the middle class objectionable.

But the thrust of the evidence was not entirely in Dedham's favor. The midnight movies had been going on for some time before the complaints started. The audience had been predominately black for a time as well. It is not clear what changed. Perhaps the white residents of Dedham were scared by the law-abiding blacks who moved about and through their community after midnight.⁷⁹ Perhaps the noise these black folks made with their cars seemed louder than the noise of whites to ears biased by fear and unfamiliarity. No mention is made of the possibility that there might exist a prejudice against blacks where civility and decorum are being assessed, particularly with regard to black leisure activities. The court never deals with the possibility of prejudice. Prejudice is a second order consideration where "legitimate" neutral reasons like peace and security can be found to supply a complete rationale for governmental action.

Unlike the citizens of Dedham, the blacks whose behavior and leisure practices were being judged were not parties to the litigation and their interests were not directly represented. The plaintiff in the case was not a patron who was denied access to late-night movies in Dedham, but the exhibitor itself, the entity that wanted the blacks' business. The unorganized black movie patrons were involved only as customers and as the subjects (or objects) of the litigation. They were never directly asked to defend their preference to attend late-night movies or to challenge the assertions that they were guilty of antisocial behavior in leaving the theater. A sociologist who investigated the defendant's claims for the plaintiff thought that the black patrons might simply have preferred to view movies together. They knew that the midnight movies were "their time" and they

76. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING SUMMARY, Tape File 3C, Table P001 (May 1993) (available on CD-ROM).

77. See *id.*

78. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING SUMMARY, Tape File 3C, Table P008 (May 1993) (available on CD-ROM).

79. Cf. Elijah Anderson, *Race and Neighborhood Transition*, in THE NEW URBAN REALITY 99, 116, 124 (Paul E. Peterson ed., 1985) (recounting reactions of white women who encounter black men on the street at night in a racially integrated community).

may not have felt as welcome, nor as comfortable, at other times.⁸⁰ In any event, the black patrons were as passive in the litigation to defend their leisure rights as they were supposed to be in consuming National Amusements' film fare.

It may be difficult to imagine that the moviegoers had as much at stake in the litigation as either National Amusements, which was concerned about control of its business and its profits, or the residents of Dedham, who were concerned about the enjoyment of their property and the preservation of their property values. Indeed, both Dedham and the district court opinion paint the plaintiff as a big corporation,⁸¹ motivated by profits and willing to run roughshod over the small town in which it is headquartered by driving up the cost of litigation and tainting the town with the stain of belated allegations of racial prejudice. Thus, the case was at base a struggle between a large commercial provider of homogenized leisure services that appeal to a wide and diverse audience, and local elites dedicated to creating an insular community and enforcing a middle-class notion of appropriate leisure.⁸² With the dispute cast this way, it seems clear that the black patrons' interest, which was purely a matter of consumption, was of relatively little consequence.

The black moviegoers who attended the late-night movies were very likely not from Dedham, but from the Roxbury and Dorchester sections of Boston. Both court opinions fail to indicate why they traveled to Dedham late at night to see a movie. The residents of Dedham may have wondered why National Amusements, owner of a chain of theaters, did not attempt to capture that black audience at another location, perhaps closer to the patrons' homes, if it really prized their business so much. At the time of the litigation, however, there were no movie theaters in the black neighborhoods of Boston.⁸³ Boston was not alone in that regard.

Though blacks are avid moviegoers, many black enclaves throughout this country lack modern first-run movie theaters. The movie houses that do exist in such communities tend to be less clean, less comfortable, and

80. Telephone interview with Jack Levin, Department of Sociology, Northeastern University (Nov. 22, 1997).

81. Plaintiff was the majority stockholder of Viacom. Brief for Appellant at ii, *National Amusements, Inc. v. Dedham*, 43 F.3d 731 (1st Cir. 1995) (No. 94-1176).

82. See generally Richard Butsch, *Introduction: Leisure and Hegemony In America*, in *FOR FUN AND PROFIT: THE TRANSFORMATION OF LEISURE INTO CONSUMPTION* 3 (Richard Butsch ed., 1990) [hereinafter *FOR FUN AND PROFIT*].

83. See Mark Muro, *For Most of Boston, the Screen Has Gone Dark*, *BOSTON GLOBE*, Mar. 29, 1991 (claiming that two-thirds of Bostonians cannot see a movie in their own neighborhoods, but must journey to the suburbs).

less modern than those in white communities.⁸⁴ Exhibitors claim that inner-city theaters are not profitable to operate because of prohibitively high expenses for security, the fear of litigation and loss of reputation if violence occurs, and poor receipts owing to the limited disposable income of the neighborhoods' residents.⁸⁵

So, under the regime of commercialized passive entertainment in late capitalism, National Amusements fought for its black patrons' rights to see movies in Dedham, while at the same time circumscribing their ability to see films closer to home. The contradiction allowed the trial court, which upheld the Dedham ban, to doubt that the consumer survey assessing the racial makeup of the late-night movie audience was undertaken to protect the patrons' best interests:

This secret and invidious survey raises extremely troubling questions concerning the judgment of National and its counsel. One wonders at the feelings of patrons of the Dedham Showcase Cinema during the summer of 1993 had they known they were secretly being counted and categorized based on their race. Indeed, what National did here appears the functional equivalent of noting the race of a customer on a check—a violation of [Massachusetts state law].⁸⁶

Towns like Dedham would probably like nothing better than for neighborhood theaters to return to black enclaves.

National Amusements raises two very important concerns with regard to assessing the propriety of governmental restraints on black leisure. First, the opinion illustrates how hard it is to surmount the association between black leisure and threats to the public health, safety, and welfare. To the court in *National Amusements* the association was a matter of "commonsense." Security concerns justify most contemporary restraints on black leisure. Vandalism and destruction of property, public urination, street drug sales, public drinking, and street harassment of women are problematic in most places.⁸⁷ Fear of crime, violence, and general disorder have prompted even black-controlled governmental entities to adopt leisure-restrictive measures. The restraints in some cases, however, may be too sweeping in effect, and the acts of a few blacks may have tarnished the reputations of the many. Though this is obviously wrong and should

84. See Steve Chagollan, *Left Screened Out; Blacks, Latinos Among L.A.'s Most Loyal Movie Patrons But Theater Builders Shy Away from Ethnic Communities*, DAILY VARIETY, Apr. 26, 1996, Special Section.

85. See Muro, *supra* note 83.

86. *National Amusements, Inc. v. Town of Dedham*, 846 F. Supp. 1023, 1026 n.3 (D. Mass. 1994).

87. See Livingston, *supra* note 38.

be disputed at every turn, how far the protests should proceed and what precisely makes a restraint excessive or improper is unclear, especially since the specter of crime, violence, and disorder can be raised in nearly every case.

For reasons explained more fully in the sections that follow, public officials should recognize the likelihood that blacks who use public spaces for leisure are victimized by policies aimed at protecting citizens' "quality of life" through policing and other forms of state control. Blacks' status as outsiders or their adherence to cultural norms that others find disconcerting, distasteful, or disruptive of the status quo place them in the vulnerable position of bearing the brunt of enforcement at the cost of losing access to entertainment and recreational venues. It is important for lawmakers and law enforcers, as well as for the courts that pass judgment on their actions, to distinguish between efforts to enforce reasonable behavioral standards consistent with democratic access to public leisure spaces as opposed to attempts to exclude blacks from meaningful participation in the nation's public life.⁸⁸ If this distinction is to be operationalized, it is imperative that the social biases that might taint governmental leisure restraints be fully exposed.

Yet, it is not at all obvious that black people have much to gain from challenging leisure restraints like the Dedham ordinance. Compared to employment, education, or housing, leisure seems quite unimportant. Add to that the fact that some forms of black leisure subject to restraint do not appeal to those who think of themselves as being "respectable" people, and leisure may seem hardly worth defending. Finally, leisure in general seems "increasingly passive, more formal, more organized, more mechanized, and more commercialized."⁸⁹ Where a leisure activity does not involve opportunities for expressions of creativity, self-affirmation, active engagement, renewal, and growth, protesting its restraint may only increase blacks' vulnerability to exploitation.

The forms of black leisure discussed in this Article, however, tend to require active participation and engagement. Moreover, the restraints on that leisure are more than the products of an exaggerated fear of black violence and disorder. As detailed below, governmental regulation of black leisure rests on a firmer, broader basis that devalues black leisure without regard to bad behavior. Leisure restraints are mandated by an

88. See *id.* at 647.

89. Ellen Wartella & Sharon Mazarella, *A Historical Comparison of Children's Use of Leisure Time*, in *FOR FUN AND PROFIT*, *supra* note 82, at 173, 179.

ideological mindset or understanding of what black leisure is, how it differs from white middle-class leisure, and therefore how it differs from what leisure is supposed to be. Furthermore, that mindset is reinforced by collective white, material self-interest that makes discrimination against blacks and segregation of leisure venues profitable. Challenging those restraints is a way for blacks to become active players in a multitude of economic arenas related to leisure markets. Leisure restraints must be attacked because leisure, particularly as it is defined in this Article, is not pursued simply for the fun of it.

III. LEISURE RESTRAINTS AS A PRODUCT OF SOCIAL INEQUALITY AND THE PRIVATIZATION OF PUBLIC SPACE

A. WHITE LEISURE AS A PRIVATE AND PRIVATIZING PURSUIT

In American society, leisure activities are generally assumed to be social activities involving *personal or intimate* interaction between and among individuals.⁹⁰ As such, they are assigned to the private sphere and subject to the modes and mores generally governing private affairs, even when they occur in public spaces. As a result, social norms of inclusion and exclusion operate with regard to public leisure activities, and the social status or rank of the participants matters. Because blacks in general occupy a socially inferior position and hold a relatively low station in the status hierarchy, their desirability as leisure companions is reduced. They are accordingly vulnerable to exclusion and discrimination in connection with their leisure pursuits.

The private nature of leisure interactions has a spatial or geographical dimension that fosters the segregation of leisure venues along status lines. Without the aid of law, public domains can be privatized or appropriated as private preserves by a group of people who (1) use them for private purposes, (2) indulge in styles of informal behavior (including dress and speech) that reflect familiarity with the surroundings and the inhabitants, and (3) adopt a proprietary attitude about the places in dealing with outsiders.⁹¹ Thus, a first-class passenger in an airliner might feel justified in asserting his priority to the first-class lavatory ahead of a passenger traveling coach.⁹² Similarly, silencing other patrons in a movie theater makes the

90. See GUNNAR MYRDAL, AN AMERICAN DILEMMA 347, 573 (1944).

91. See LYN H. LOFLAND, A WORLD OF STRANGERS: ORDER AND ACTION IN URBAN PUBLIC SPACE 123-24 (1973).

92. Cf. *Vaccaro v. Stephens*, No. 87-1777, 1989 U.S. App. LEXIS 5864, 879 F.2d 866 (9th Cir. 1989) (condemning the physical assault by a large white man traveling first-class on the person of a

experience less public and communal for them, but it is in accord with the expectation that patrons should enjoy the film "in the privacy of their fantasies."⁹³

Through the process of privatization, public leisure spaces take on, reflect, and are characterized by the social standing and the racial identities of the persons who occupy them.⁹⁴ Thus, there are white-identified leisure spaces and nonwhite-identified leisure spaces. A white-identified space is one in which whites predominantly play and seek to maintain that predominance through formal and informal mechanisms of exclusion. A white-identified space may also be characterized by the nature of the leisure activity conducted there. Camping, playing tennis, and listening to classical music are white-identified leisure activities, and national parks, tennis courts, and symphony or concert halls are consequently white-identified spaces. Playing basketball and enjoying rap music, on the other hand, are associated with blacks and may be thought of as black activities; urban outdoor public basketball courts and rap concerts are typically considered black-identified.⁹⁵ Racialized space may also be assessed temporally; there are restaurants and movie theaters (like the one in Dedham, Massachusetts) that are white by day and black by night, or vice versa, and beaches that are white from the late Fall to the early Spring and multiracial during the rest of the year.⁹⁶

It is not just the patrons of so-called "third spaces" (not home and not work) who engage in this process of privatizing and racializing; it is the proprietors as well. Historically, according to social historian David Nasaw, the respectability, and thereby the profitability, of places of commercialized mass entertainment and amusement, be they movie palaces or world's fair pavilions, have long been based on the inclusion of white women among their patrons and the exclusion of all blacks, regardless of

small, dark-skinned American woman of Spanish-Filipino descent traveling coach and sanctioning his lawyers for filing a frivolous counterclaim).

93. Bruce A. McConachie, *Pacifying American Theatrical Audiences, 1820-1900*, in *FOR FUN AND PROFIT*, *supra* note 82, at 52.

94. For discussions on the racialization of space, see John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1235, 1250-51 (1995); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

95. See Francis Callaway Parks, *Is the Recreation Industry Color Blind?*, PARKS & RECREATION, Dec. 1990, at 42 (comparing racial differences in leisure expenditures by nature of activity).

96. The audiences of the movie theater in *National Amusements, Inc. v. Town of Dedham* became blacker as the day progressed. See Alisa Lefkowitz, *The Transformation of Sunken Meadow into Sunken Ghetto* (1997) (unpublished student paper) (on file with author) (recounting the seasonal transformation of the users of Sunken Meadow State Park in Long Island and the attitudes of nearby residents regarding the change).

gender or class.⁹⁷ From the mid-1800s to the civil rights era (if not beyond), prohibitions against or on blacks' participation enhanced the status of mass forms of leisure by countering the moral and material concerns of the bourgeoisie, which favored leisure consistent with domesticity and educational enrichment and feared association with persons who were vulgar and rowdy.⁹⁸ The exclusion or restricted inclusion of blacks, who were assigned the role of indecent, disreputable "other," made possible the creation of audiences that were heterogeneous and democratic as to gender and class, insofar as whites were concerned.⁹⁹ It allowed for the uniting of white Americans—native-born and immigrant, middle-class and poor—in a common experience of luxury in leisure venues under an umbrella of white privilege that generated conduct characterized by decency and goodwill. In some cases, the message of black inferiority and white superiority was even reinforced by the fare being served to the segregated audiences (for example, exhibitions of blacks in African village settings or performances by whites in blackface).¹⁰⁰

A similar process of privatization and racialization occurred in connection with noncommercial, publicly owned leisure venues. One of the most graphic historical illustrations of the denial of access of blacks, and working-class whites, to public leisure sites through manipulation of the transportation infrastructure is described in Robert Caro's massive study of the life of New York master public works builder Robert Moses.¹⁰¹ According to Caro, Robert Moses was very particular about the kind of people who could utilize his parks; he considered blacks "dirty" and therefore created obstacles impeding their access to Jones Beach on Long Island. Access in general was restricted because Moses refused to allow the Long Island Railroad to construct a branch spur to Jones Beach and built the bridges over the parkways leading to Jones Beach too low for buses to pass underneath.¹⁰² Because buses were forced to use the local roads, the trip to Jones Beach was "discouragingly long and arduous."¹⁰³ Buses chartered by blacks faced additional difficulties in obtaining the necessary permits to enter Jones Beach, and their buses were routinely shunted to the farthest

97. See DAVID NASAW, *GOING OUT: THE RISE AND FALL OF PUBLIC AMUSEMENTS* 26, 31-32, 47-51, 60-61, 236-39 (1993).

98. See *id.* at 15-18.

99. See *id.* at 237-40.

100. See *id.* at 51-60, 77.

101. See generally ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

102. See *id.* at 318.

103. See *id.*

reaches of the parking areas of other, more remote parks on Long Island.¹⁰⁴ Complaints by black leaders to President Roosevelt produced no change in the policies. Moses' efforts to discourage blacks' utilization of Jones Beach were not limited to transportation hurdles. "Moses was convinced that Negroes did not like cold water; so the temperature at the pool at Jones Beach was deliberately icy to keep Negroes out."¹⁰⁵ Of course today, Jones Beach is the site of major hip-hop and rhythm-and-blues concerts, and a lively gathering place for young black New Yorkers.¹⁰⁶

Just because a space is white-identified does not mean that blacks avoid it. True, some "white" leisure spaces are more enticing to blacks than others. Museums, for example, cause even middle-class blacks discomfort, because of their cost, the irrelevancy of their content to blacks, and their perceived racial bias.¹⁰⁷ But in many instances, blacks are moving their socializing into areas that are informally understood to be white. It is becoming increasingly more common to see blacks recreating in or on ski slopes, tennis courts, golf courses, cruise ships, and national parks.¹⁰⁸ Thus, the inventory of leisure spaces that may be considered white-identified is constantly in flux.

Whites, however, are not accepting black encroachment of their public leisure spaces without opposition. The process of ensuring security and pursuing respectability in leisure arenas through the exclusion of all or some blacks continues. Similar attempts at separation or containment are being made by some middle-class blacks who are threatened by poor and working-class black "intruders." The demise of Jim Crow and de facto segregation has made it harder to keep such black folks at bay. Laws and other forms of governmental action, such as those described in Part II of this Article, nonetheless remain tools that communities can invoke in cir-

104. See *id.* at 319.

105. See *id.*

106. See Reid Frazier, *Revelers Jam Beach From Alpha to Omega*, *NEWSDAY* (Queens ed.), June 30, 1996, at A28 (describing the annual black fraternity and sorority gathering at Jones Beach for Greekfest); Talise D. Moorer, *P-Funk, hip-hop and Baduism Are Tastes From House of Blues Tour*, *N.Y. AMSTERDAM NEWS*, July 16, 1997, at 27 (describing a Jones Beach concert featuring some of the biggest names in the hip-hop industry); Samson Mulugeta, *Greekfest a Gridlock at Jones Beach*, *NEWSDAY* (Nassau and Suffolk ed.), June 29, 1997, at A27 (describing traffic jams generated by 25,000 folks gathered for the annual event).

107. See John H. Falk, *Factors Influencing African American Leisure Time Utilization of Museums*, 27 *J. LEISURE RES.* 41, 53 (1995); Steven F. Philipp, *Racial Differences in Perceived Leisure Constraints*, 79 *PERCEPTUAL & MOTOR SKILLS* 1339, 1341-42 (1994). For a description of the sort of discrimination a black parent can encounter on a trip to a museum with black boys in tow, see Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 *DENV. U. L. REV.* 237, 257-58 (1993).

108. See generally Dari Giles, *Just Say Snow: Black Skiers Brave the Slopes*, *HEALTH QUEST: THE PUBLICATION OF BLACK WELLNESS*, Jan. 31, 1996, at 57.

cumstances of conflict with blacks over leisure space and the mobility that it takes to occupy them.

Governmental restraints, then, operate as barriers to unwanted social contact between whites and blacks, and in some cases between bourgeois blacks and poor and working-class blacks, by turning leisure spaces otherwise open to the public or owned by governmental entities into the equivalent of private places. Indeed, some governmental restraints seem to go beyond that by attempting to "sanitize public spaces" and "reconstruct the public realm to eliminate the troublesome presence"¹⁰⁹ of other races.

Leisure may be unquestionably personal and unquestionably private in some respects, but it ceases to be so when the power of the state is used to exclude otherwise law-abiding blacks from public leisure venues and to restrict their ability to engage in certain leisure activities in order to facilitate the leisure pursuits of others. At that point, leisure is most definitely a matter of societal and civic concern, and the values that produce a racialized social inequality in the truly private spheres of life should have little import.

B. BLACK SOCIAL INEQUALITY AS IT RELATES TO LEISURE

To an extent that is hard to measure, governmental restraints on black leisure, like truly private forms of leisure exclusion and venue privatization, reflect the impact of the social inequality from which blacks suffer. The state participates in the process of pathologizing black leisure by regulating black leisure as if it were deviant and problematic, while legitimating the leisure activities of others as "healthy," "uplifting," "decent," "proper," and therefore "normal."¹¹⁰ For example, the Dedham ban on midnight movies was justified in just this way.¹¹¹

There has been no recent systematic study of the relationship between blacks' social inequality and the creation and enforcement of governmental restraints on black leisure. The discussion that follows merely speculates on how some of the untested assumptions on which blacks are deemed to be socially inferior may operate with regard to leisure regulation and control. Unfortunately, it may provide a more coherent story than exists in reality. That is not the intent.

109. Boga, *supra* note 38, at 493.

110. See CHRIS ROJEK, *DECENTRING LEISURE: RETHINKING LEISURE THEORY* 19 (Norman K. Denzin ed., 1995).

111. See Brief for Appellant at 13-14, *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995) (No. 94-1176).

If the panoply of governmental restraints catalogued in this Article do nothing else, they suggest that black leisure is violent and dangerous, and that the places where blacks recreate and find leisure are dangerous, too. Dangerous people and dangerous places call for increased law enforcement and greater restrictions on usage. But the potential for crime of various degrees is not all that makes black leisure distressing or problematic to middle-class whites and blacks. Blacks' civility and good manners are often called into question. Consider the following discussion of the conflict between low-income and working-class black moviegoers, on the one hand, and some white and black bourgeois moviegoers, on the other hand, taken from William Julius Wilson's book *When Work Disappears*:

[T]he tendency [of socially isolated ghetto blacks] to enjoy a movie in a communal spirit by carrying on a running conversation with friends and relatives or reacting in an unrestrained manner to what they see on the screen—is considered . . . offensive by other groups, particularly black and white members of the middle class. Expressions of disapproval, either overt or with subtle hostile glances, tend to trigger belligerent responses from the inner-city ghetto residents, who then purposefully intensify the behavior that is the source of irritation. The white and even the black middle-class moviegoers then exercise their option and exit . . . by taking their patronage elsewhere, expressing resentment and experiencing intensified feelings of racial or class antagonism as they depart.¹¹²

Fear of black bodies also seems to play a role in the policing of black leisure. As cultural critic Chris Rojek has noted, “[m]uch of our leisure time is devoted to maintaining our bodies, improving them, displaying them, scenting them, and decorating them.”¹¹³ Fear of the power of black bodies explains some of the anxiety behind efforts to curb body-building as a recreational activity in prisons.¹¹⁴ The psycho-sexual power that black bodies seemingly manifest subjects black males to special policing at public pools and on the streets—in any leisure venue where black male bodies are exposed or on display and females (especially nonblacks or the bourgeoisie) might be vulnerable to unwanted sexualized aggression.

Another possible source of black social inequality in the leisure area can be found in the low opinion in which some black workers are held. Leisure is generally considered a reward or an *entitlement* earned through

112. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 187 (1996).

113. ROJEK, *supra* note 110.

114. See John D. Hull, *Building a Better Thug?*, TIME, Apr. 11, 1994, at 47 (reporting that prisoners scoff at the idea that body-building is directly related to increased prowess as a criminal).

hard work in the realm of production. "[L]ives built around leisure [are] morally inferior or at least morally suspect."¹¹⁵ Moreover, leisure is supposed to recharge one for renewed effort in the workplace. But, according to the results of surveys reported by Wilson, many employees believe that black inner-city workers are lazy, uneducated or undereducated, undependable, uncooperative, dishonest, and/or connected with criminal networks.¹¹⁶ The entitlement of such workers to unrestrained leisure is likely to be suspect. Moreover, their leisure is likely to be subject to heightened regulation when it interferes with their ability to do their jobs.

Even the debates among blacks over government funding of midnight basketball leagues in black urban communities were impacted by claims that blacks pursue leisure at the wrong times, in the wrong places, and in the wrong ways.¹¹⁷ In the view of some, midnight basketball illustrated that some blacks confuse work and leisure, give leisure priority over work, and adjust to the leisure that comes with unemployment and underemployment all too well.

It seems highly plausible then that blacks' low social standing, their association with incivility, disorder, and excessive physicality or sexuality, and their denigration as workers facilitate the construction of black leisure as yet another area of black deviance or pathology deserving of social and legal constraint. There are several ways to combat these notions.

While the negative leisure-related characteristics ascribed to all blacks may be true of some blacks, they certainly do not accurately de-

115. ROJEK, *supra* note 110, at 188.

116. See WILSON, *supra* note 112, at 111.

117. Compare Joseph H. Brown, *Time for Black Americans to Assume a Crime "Victim" Mentality*, NAT'L MINORITY POL., Dec. 31, 1994, at 26 (advocating opposition to measures like midnight basketball that coddle criminals); Ralph Reiland, *Basketball Pork*, NEW PITT. COURIER, Aug. 17, 1994, at A7 (reporting on community opposition to late-night basketball as a misguided attempt by professionals who do not live near their experimental programs and do not know how dangerous playgrounds are); and Michael Sharp, *Hope and Freedom Beat Government Charity*, PHILA. TRIB., Sept. 12, 1995, at 7A (warning against increased dependency on government programs like midnight basketball for teenagers who should be home studying), with Ahmed J. Bundick, *Midnight Basketball Opens Door to Education and Camaraderie*, CALL & POST (Columbus, Ohio), May 19, 1994, at 1C (touting the educational and emotional benefits of midnight basketball); Walter C. Farrell, Jr., *Midnight Basketball Could Help in Reviving the Inner City*, PHILA. TRIB., Sept. 23, 1994, at 5B (asserting that midnight basketball is more beneficial and efficient than other punitive or paternalistic measures); *Midnight Basketball Gets Gangs off the Streets*, MICH. CHRON., May 10, 1994, at 10B (reporting on an interview with the director of the national association for midnight basketball leagues who says that programs build character); *Midnight Basketball Plays Important Role*, N.Y. BEACON, Sept. 6, 1995, at 46 (touting benefits of program in challenging energy and teaching social skills); and Max Millard, *Midnight Basketball: The Show Goes on; Wilson Cuts Entire \$50,000 State Support*, SUN REP. (San Francisco), Aug. 31, 1995, at 3 (explaining the operations of the program and its accomplishments in the face of a veto of state funding by the governor).

scribe most blacks. Although there have indeed been a number of mass black social events that ended in chaos and violence that seem to have left an indelible impression on the white collective psyche,¹¹⁸ there have been even more events that were peaceful and orderly, but only blacks seem to remember them. Stereotypes operate without regard to all the facts. At a minimum, the state might devote greater effort to distinguishing blacks who conform to the stereotypes from those who do not in order to preserve the access to leisure for those who have done nothing to warrant restraint. But this approach, of course, has its limitations.

Blackness is a social construction with biological attributes. The only way for a black individual to entirely avoid being restrained in his or her leisure pursuits is to stop being black, but that is extremely hard to do. A black male executive in a suit and tie is still suspect because middle-class manners are so easily feigned and the accouterments of high status even more easily acquired. In addition, whites who have decent personal relationships with some blacks do not necessarily have more liberal attitudes toward blacks they do not know. It is up to each black person to prove himself or herself.

Even if greater resources are expended in discriminating among blacks, some mistakes will be made because whites and others in authority do not necessarily judge black behavior by the appropriate standards. Violence and physical aggression by anyone is unacceptable in most, if not all, public leisure venues; but blacks have a significant interest in ensuring that they share a common understanding with those in charge of policing their leisure regarding what constitutes inappropriate behavior. The sources of misjudgment and bias are infinite.¹¹⁹ Because blacks have been subject to different material conditions than whites, they have resorted to different cultural adaptations which, sustained over time, have produced different cultural practices. These may be, from black people's perspective, entirely proper and legitimate. For example, if blacks seem to mix work and leisure, there are a number of possible explanations for it. Gunnar Myrdal concluded that blacks integrated work and pleasure because

118. For example, the extensive catalogue of incidents of mass looting and violence in the appendix to Roger Scott's article on looting seems weighted in favor of events involving minority people. See Roger D. Scott, *Looting: A Proposal to Enhance the Sanction for Aggravated Property Crimes*, 11 J.L. & POL. 129 (1995). The leisure-related incidents involving black Americans occurred following or in connection with sports victory parades, packed movies and hip-hop concerts, and mass parties and celebrations, in such places as Philadelphia, Los Angeles, Berkeley, California, and Detroit. See *id.* at 181-87, 193. The events that occurred during the Greekfest Labor Day weekend in Virginia Beach in 1989 are classified as a "grievance riot" or "assembly." See *id.* at 193.

119. See LOFLAND, *supra* note 91.

they did not have a great deal of leisure time, and many of the usual forms of recreation were denied to them.¹²⁰ Alternatively, black work culture enables blacks to defy militarization and excessive employer control by introducing elements of play into the work environment in order to make the work easier and more enjoyable.¹²¹

Some restraints on leisure are covert or de facto attempts to control and channel workers' labor power by restricting how they invest their time, energy, and money in nonwork pursuits. Forms of leisure that might adversely impact black workers' ability to labor or allow them to forget their lower employment class standing are likely to be condemned in ways that obfuscate employers' interests. Stereotypes about the worth of blacks as workers and as leisure seekers not only justify job and wage discrimination; they also trick some black people into working harder and playing only in the most respectable ways so as to prove that the stereotypes are not true.

It would advance the cause of black freedom if blacks' behavior in a public leisure venue were judged by some of the same standards blacks employ in assessing their conduct inter se, though there is hardly universal agreement on such appraisals. Take the practice of blacks' commenting on the action in a movie so loudly that the rest of the audience can hear them, though the characters on the screen cannot. For some blacks, part of the pleasure of watching a film in a public theater is the communal feeling that comes from being surrounded by others verbally engaging the film. Sometimes such commentary is proper and sometimes it is not. It is one thing if the comments are inappropriate in timing or content and interfere with the audience's ability to comprehend the dialogue or betray a lack of awareness of the seriousness of the fare. It is another when the comments express a critical response to a portrayal of blacks that is too true not to be acknowledged or too bogus not to be exposed.

Blacks' speaking to the audience and the screen is nothing new. More than a half-century ago, E. Franklin Frazier described similar conduct in a research memorandum written in connection with the study that produced Gunnar Myrdal's *An American Dilemma*.¹²² In detailing the behavior of Southern poor and working-class blacks in movie theaters where they could give free rein to their feelings and impulses, Frazier wrote:

120. See MYRDAL, *supra* note 90, at 986.

121. See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 25-26 & n.140 (1989).

122. See E. Franklin Frazier, *Recreation and Amusement Among American Negroes* (Research memorandum prepared for the Carnegie-Myrdal Study 1940) (on file with author).

“They may indulge in unrestrained laughter, clapping of hands and stomping of feet and expressions of approval or disapproval of the characters in the picture. Scenes involving love making generally provoke the heartiest responses.”¹²³

Blacks know that they are not the only people who respond to movies by talking back to the screen. This sort of “interactive” behavior has also been attributed to poor and working-class people or to gays. Because race is a catchall for many kinds of social inferiority, characteristics that are ascribed to blacks in general might alternatively be assigned to cultural categories distinguished by class, gender, or sexual orientation that cut across racial lines. Of course, the entertainment of these groups, like that of blacks in general, is judged more often and more harshly because it is more public and visible since the groups do not control sufficient private spaces in which to entertain themselves.

In any event, most black people are not ashamed of their pleasure. In their view, they have earned it. Because of the forces aligned against it, black pleasure has to be dangerous to some extent—taking risks, skirting the boundaries of respectability—in order to exist. Blacks too may experience the pleasure of leisure differently from whites. Pleasure for blacks is a social good that needs to be expressed and shared. Long ignored and underrepresented in motion pictures, blacks take delight in seeing images of themselves on the screen, as most others do, and some express that pleasure with a smile and a nod, while others laugh and applaud.

Sometimes a movie theater is a public gathering place where a segment of the polity meets, forms, and even expresses collective opinions. At other times, it is merely a commercial business offering passive, privatized individual entertainment.¹²⁴ Movie theaters like the movies themselves are a site of social contestation pitting whites against blacks, the middle class against the working class, adults against children, and men against women. Every public place where blacks gather, even for purposes of leisure, should be viewed as a possible site for the development of critical faculties and constructive solidarity. Every public space where blacks gather is part of the black public sphere. That includes movie theaters. This is one significant aspect of the “midnight movies” that the courts in *National Amusements, Inc. v. Town of Dedham* did not consider.

123. *Id.* at 29.

124. Cf. McConachie, *supra* note 93, at 52 (describing how upper-class males viewed theaters as “public” gathering places where controlled disturbances by non-elites were employed to express opinions about the fare).

Furthermore, the social inequality that makes some moviegoers reluctant to share a cinema with blacks produces discrimination and segregation which are not confined to the walls of multiplexes. Indeed, the social inequality manifested in restraints on black leisure impacts blacks' status in other spheres. Social inequality makes inequality in economics, politics, and law that much "more possible and seemingly justifiable on grounds of inferiority."¹²⁵ Moreover, inferior social status reproduces inferior material circumstances, which in turn support and justify further discrimination.¹²⁶

C. SURMOUNTING THE RESTRAINTS OF SOCIAL INEQUALITY AND THE PRIVATIZATION OF PUBLIC SPACE

Whites' attitudes about the desirability of social equality for and social interaction with blacks have softened over time, but sweeping, general negative assessments of blacks still appear to have a powerful effect on the actions of whites. According to *A Common Destiny*, the National Research Council's update of Myrdal's survey of race relations,¹²⁷ whites in general espouse an ideology of equality, though their support for action to effectuate it wanes in situations where the "social contact is close, of long duration, or frequent and when it involves significant numbers of blacks."¹²⁸ Thus, "[w]hites are more accepting of equal treatment with regard to the public domains of life than private domains of life, and they are especially accepting of relations involving transitory forms of contact."¹²⁹

However, what could be more fleeting than passing someone on the street? Some whites are upset or unnerved by even such brief encounters with black folks, particularly black men.¹³⁰ Fear of crime is the usual excuse, though most black people are not criminals. Thus the beliefs that attribute to blacks a string of deviant behaviors mar even the most cursory contact between blacks and others. It is unsurprising, then, that blacks find themselves physically foreclosed from places that are considered public as to white users. In addition, the scope of personal prerogatives that keep people at a physical and social distance from each other may be more expansive where blacks and whites are concerned. What seems impersonal

125. MYRDAL, *supra* note 90, at 642.

126. *See id.* at 643.

127. *See A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

128. *Id.* at 155.

129. *Id.* at 117.

130. *See Anderson, supra* note 79, at 113-16.

and social to many black folks may be deemed highly personal, if not intimate, to some white people and vice versa. Because invisible lines are easily and innocently crossed, black folks are regularly accused of taking liberties.

There is another (generally unmentioned) factor operating here. Street encounters are especially problematic because the streets are a social space whites and persons in authority cannot completely control. Whites' actual behavior and their expressed attitudes about blacks can be reconciled by understanding (though not necessarily accepting) that "public" and "private," "fleeting" and "abiding" are defined by whites with due regard for the solidity of white power. If blacks suffer from leisure restraints, whites enjoy leisure privileges, and those privileges have material consequences that would be adversely impacted if blacks mounted a sustained attack on governmental restraints on their leisure.

There are people—not just white individuals, but blacks and others as well—who believe that our society would be a better and safer place if black people would just stay where they belonged—in their designated or informally identified public spaces. Of course, those blacks who are "flamboyant or eccentric" could move about just a bit to assure the bourgeois majority of its liberality and to provide the cultural bandits of the entertainment/amusement industrial complex with ideas for new products and services.¹³¹

The world does not work that way, however. Conflicts over public space are inevitable, like conflicts over status and conflicts over the distribution of material wealth. Governmental leisure restraints may involve all three. Tacitly justified by social inequality, they determine blacks' access

131. A variation on this proposition finds its most thoughtful and sophisticated articulation in Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996). To deal with the problems the homeless and other street people cause, Professor Ellickson proposes that zoning provisions divide public space into three use categories. See *id.* at 1220. One category would encompass red-light districts that would be relatively free of restrictions on the activities of street people. Intermediate zones would be characterized by just enough restrictions to make the space comfortable for the majority of people, but not so constrained that the "flamboyant or the eccentric" would be kept out. Finally, there would be spaces where unusually sensitive users, like children and the elderly, would be given a place of refuge from public misconduct. Ellickson acknowledges that poor minority communities might receive a fair number of designated unruly zones and "understandably might perceive environmental racism at work." *Id.* at 1244. He offers them no special mechanism of redress. As for the displaced street people, Ellickson suggests that private code enforcement would be worse. See *id.* Ellickson acknowledges the tension between "[t]he efficient pursuit of street decorum" and "protecting unpopular people from arbitrary police actions." *Id.* at 1245. Hope lies in the "maintenance of a trustworthy police department," through "[s]election, training, and supervision," integration of the police force, and community policing. *Id.*

to public property and the distribution of the benefits of public wealth. Simple appeals to sentiment will not stop the discrimination and segregation that constrict black leisure and allocate public resources away from the black population, especially its poorer segments. Social inequality is ultimately a matter of interest, not merely a matter of sentiment.¹³² Sentiment in any event carries little weight with the increasing number of people who claim not to know about this country's history of racial discrimination against its black citizens and who refuse to accept any responsibility for the past.

Though goodwill and kind regard cannot be legislated, they can be fabricated. To spur a change in beliefs about blacks' inferiority and entitlement to leisure, blacks have at their disposal ballots and "bucks." The vote will not effect change where adversely affected blacks and their supporters are too scarce to influence the politics of leisure constraints. Alternatively, blacks might put themselves in social roles where social acceptance is in the best interests of those who would restrain them; blacks might insinuate themselves into positions where they can deliver on a promise of a reward for those who act right. For that to happen though, black leisure must have more moral and material value than it presently does. Despite total black spending on entertainment and leisure (such as concert and theater tickets, and club memberships) of \$1.8 billion in 1995, with another \$4.2 billion in travel expenditures,¹³³ blacks still face social and legal discrimination. If existing markets do not recognize the legitimacy of black folks' full entitlement to the pleasures and benefits of leisure, then blacks will have to build their own.

Articulating the significance of black people's leisure is an essential predicate to blacks' attempting to liberate it from governmental strictures, as well as the social biases and material exploitation on which they are based. No campaign to expand the freedom of blacks to pursue leisure, either through increased opportunities in existing white-dominated areas or through expansion of the black public sphere, can possibly succeed unless blacks themselves believe in the importance of their leisure. Black people's leisure must be important to black people.

Vital black interests are at stake when black leisure is restrained. Black leisure is an extremely valuable segment of the black public sphere and an essential element of the black good life. For reasons discussed in

132. See MYRDAL, *supra* note 90, at 585.

133. See Cliff Edwards, *Study Says Blacks Spend More on Big-Ticket Items Than Whites*, MARKETING NEWS, Sept. 23, 1996, at 27 (reporting on the findings of a survey conducted by Target Market News entitled "The Buying Power of Black America").

the next section, it must be protected even in the face of assertions that it jeopardizes public welfare and safety.

IV. THE IMPORTANCE OF LEISURE TO THE BLACK GOOD LIFE AND THE BLACK PUBLIC SPHERE

Personal intimacy or close relationships with individual whites are only one measure of social equality, and only one means of achieving it. Most blacks, I believe, would be satisfied with fair, equal, and respectful interaction with whites in formal social situations, and tolerance and openness in casual encounters. Of greater concern, however, is institutionally constructed social distance like that produced by governmental regulation of leisure. Such distance both reflects and creates intolerance and avoidance, and adversely impacts blacks' positions in the spheres of economics, law, and politics. For this and other reasons, black leisure is well worth defending against governmental restraint.

Leisure is or should be first and foremost about having fun. Black folks need to have fun like everyone else. The pursuit of pleasure for its own sake is very important. "Play mobilizes the imagination. It thrives on projection, irony, allusion and fantasy Through imagination we develop our sense of difference, otherness and identity."¹³⁴ "Through play, [blacks, like others,] live out emotions that are either repressed or diverted by the rest [of their lives]."¹³⁵

The benefits of play are confirmed by Julian Roebuck's ethnographic study of the Crossroads, a Mississippi gas station where blacks gathered on the weekend to socialize and drink.¹³⁶ Roebuck concluded that the site provided its patrons with a "playful setting."¹³⁷ Patrons were "able to drop daily routine cares, relax, engage in new experiences with new objects, try out new selves, and take part in a variety of sociability play forms and expressive behaviors including: flirting, courting, grooming talk, gossiping, strutting, biographical embroidering, frolicking, posing, repartee, clowning, etc."¹³⁸ Blacks also dealt with the reality of their lives at the Crossroads. It served as a clearinghouse for employment opportunities and a source of news about the surrounding black community.¹³⁹

134. ROJEK, *supra* note 110, at 185.

135. *Id.*

136. See Julian Roebuck, *Sociability in a Black Outdoor Drinking Place*, 7 *STUD. IN SYMBOLIC INTERACTION* 161 (1986).

137. *Id.* at 195.

138. *Id.*

139. See *id.*

In addition to pleasure, leisure provides individuals with other spiritual benefits, including a sense of achievement from realizing one's potential through self-determination and self-actualization, the exhilaration of physical exertion, and the rewards of group involvement and sociability.¹⁴⁰ Leisure is also said to produce societal benefits. It "improve[s] the quality of life[,] . . . reduce[s] pathology, build[s] constructive values, and make[s] communities better places in which to live."¹⁴¹ Leisure activities for the young build character and generate alternatives to antisocial behavior. Leisure is also a rest or a respite, a break from the hard and frustrating aspects of blacks' participation in the labor market.

The benefits blacks reap from leisure may depend on where it is sought. Blacks appropriate real and symbolic capital when they socialize or recreate in areas previously foreclosed to them. For example, in locating their affairs in white-identified venues that are devoted to particular sorts of cultural activities, blacks seize for their own use the physical infrastructure—buildings, transportation, amenities—that is already in place. That makes it easier and cheaper for blacks to socialize. Young blacks in particular find in such places wealthier, more stable leisure or recreational institutions that can expose them to the skills and values they may need in order to pursue more successful lives in the world beyond the communities in which they reside. Moreover, such areas are symbolically where the action or activity is supposed to be. By interjecting their programs into such spaces, blacks seize some of the symbolic value of the sites for themselves. Although interracial relationships and personal interaction with whites and others can be advantageous, social equality is also increased to the extent that blacks occupy the same social spaces or settings that whites and other nonwhites do. This allows others to see blacks as equals who engage in the same sorts of pursuits.

Rather than individually seeking interracial relationships and personal interaction with whites, blacks today are moving their socializing into areas that are informally understood to be white and utilizing existing white-identified places of public accommodations, entertainment, and amusement, or opening and patronizing their own establishments outside of black enclaves. Furthermore, they are moving against the physical boundaries of black social inequality in groups. There is safety in numbers; a bunch of

140. See RICHARD KRAUS, *LEISURE IN A CHANGING AMERICA: MULTICULTURAL PERSPECTIVES* 385 (1994); Seppo E. Iso-Ahola, *A Psychological Analysis of Leisure and Health*, in *WORK, LEISURE AND WELL-BEING* 131, 135-140 (John T. Haworth ed., 1977).

141. RICHARD KRAUS, *PUBLIC RECREATION AND THE NEGRO: A STUDY OF PARTICIPATION AND ADMINISTRATIVE PRACTICES* 5 (1968).

black folks are more likely to get better treatment; and they can carry their sense of homeyness and intimacy with them.¹⁴²

In America, there are psychic rewards to being on the move. Mobility is an important aspect of the dominant culture which idealizes automobiles and highways. Mobility is associated with adventure and conquering the unknown and the forbidden. Where access to a place of leisure is restricted or proscribed, being there is an event; traveling there is a challenge. Going where one is not supposed to be and making a scene with one's mere presence are forms of defiance and resistance that many blacks find hard to resist. Socializing and pursuing leisure activities in restricted areas increases the psychic rewards reaped by blacks from mobility.

Physical mobility in the pursuit of leisure is especially important to those blacks who feel compelled to entertain as well as to be entertained in places beyond their immediate residential communities. Many poor black neighborhoods lack the facilities and public services that make leisure easy and enjoyable. Moreover, some black communities are dangerous, particularly at night and especially for women and the elderly. People are barricaded in their homes, afraid to venture into the street for an evening social or political function. The threat and fear of physical violence restricts their leisure choices.

Dorceta Taylor's study of public park usage by blacks in New Haven, Connecticut, illustrates the impact of fear and violence on some blacks' pursuit of leisure.¹⁴³ Taylor found that thirty percent of the blacks she interviewed said they avoided the parks because they were perceived to be dangerous places; none of her white respondents expressed such a view.¹⁴⁴ The blacks who perceived the parks to be dangerous were primarily in the lowest income category.¹⁴⁵ In fact, younger black women were most concerned about danger.¹⁴⁶ "Many women did not want to use parks that were merely ball fields, that had too many men hanging around all the time, that had drugs, or where there were violent incidents."¹⁴⁷ Taylor suspects that

142. See Giles, *supra* note 108, at 57 (explaining why blacks are attracted to black ski clubs). See also Steven F. Philipp, *Race and Tourism Choice: A Legacy of Discrimination?*, 21 ANNALS OF TOURISM RES. 479, 485-86 (1994) (suggesting that class, subcultural values, and the impact of discrimination may explain why blacks prefer to "travel in larger, more secure groups to known areas, patronize hotels and restaurants with familiar names, avoid streets they do not know, make fewer unplanned stops, and keep moving from one activity to another to avoid being in one place too long").

143. See generally DORCETA E. TAYLOR, *IDENTITY IN ETHNIC LEISURE PURSUITS* 171-81 (1992) (describing factors that impact the use and nonuse of neighborhood parks).

144. See *id.* at 171.

145. See *id.* at 177.

146. See *id.* at 174.

147. *Id.* at 241.

the women's alienation from parks impacted their children's access and exposure to park recreational opportunities.¹⁴⁸ According to Taylor, her black respondents' "favorite parks are places where [they feel] there is calm, no confusion, no rowdiness, and where mixed family age-groups can recreate together in both passive and active ways. These are places free from drugs, and places where the respondents feel safe."¹⁴⁹

To make friends, to build networks, to avoid entangling alliances that turn neighborhoods into turfs and turfs into battlefields, or simply to treat themselves to the latest in movies and merchandise, many black people frequent social spheres that are beyond the communities they inhabit. Areas considered white or bourgeois allow them a freedom in which to socialize that they are unable to procure or demand closer to home. At times the behavior of mobile black people may seem indecorous, inelegant, or in violation of local aesthetic contracts. In assessing their conduct, however, it should be remembered that far greater harms might occur if they were forced to pursue their leisure exclusively closer to home.

Although it is important to expand black leisure into new venues, blacks must, of course, hold on to the venues they presently control. This is particularly true of parks and beaches.¹⁵⁰ Claiming a piece of or holding onto a contested space for active, engaged physical leisure will become more important as corporate interests seek to increase the role of passive, culturally homogenized, synthetic leisure in the lives of working and middle-class blacks and decrease it in the lives of others. The supply of leisure space is dwindling, and environmental injustice has generally imposed upon blacks, other minorities, and the poor the burden of spatial scarcities. If problems with leisure in black communities drive blacks outside of their communities in search of recreation, entertainment and amusement, those problems must be tackled so that leisure venues within black communities can be saved. Furthermore, no segment of the black population should be ignored in this regard; the needs of women, children, lesbians and gays, the elderly, and the disabled must be considered.

Finally, blacks need leisure to expand the field of their commerce and consumption. Mobile blacks remain interested in patronizing black busi-

148. See *id.* at 251.

149. *Id.* at 204.

150. See CLAIMING OPEN SPACES, *supra* note 16 (exploring the threat to parks and urban open-air spaces in several black communities); MARSHA DEAN PHELTS, AN AMERICAN BEACH FOR AFRICAN AMERICANS (1997) (recounting the history of American Beach, a black coastal community located on the southern end of Amelia Island, Florida, from its founding by the head of the Afro-American Insurance Company, through its years of development by middle-class blacks, to its present precariousness as the neighbor of large-scale resort developers).

nesses that cater to them, but there is no reason why these businesses should be geographically confined to black enclaves. Leisure time and space have been altered by mass communications and cheap public and private transportation. Black businesses have attempted to expand beyond the boundaries of black enclaves as their patrons have dispersed. Blacks are pushing the physical boundaries of the black public sphere to reflect the technological advances of modernity.

In addition, leisure has become a major economic activity and a key factor in domestic and international commerce. There is a growing market for businesses providing services to leisure seekers, and blacks are establishing real niches in the sports and entertainment industries. Blacks' access to leisure markets as producers or suppliers is dependent, in some cases, upon their access to leisure markets as consumers. One learns the business by first being a consumer. Leisure is also a means of acquiring the experience and exposure required to generate markets and audiences. Through leisure, blacks build the social networks that are essential to successful development of social, professional, and occupational skills as well as a source of information about job openings and business opportunities.

Blacks who see the linkage between their leisure-time activities and their business and occupational advancement are more interested in access and publicity than intimacy where whites are concerned. They are not waiting for whites to come to them; they go where whites are with an insistence that captures attention and asserts their entitlement to active participation in the production aspects of leisure.

Blacks' quests for mobility in and through the pursuit of leisure are not flights driven by the fancy of dogma. The rhetorics of integration and nationalism do not capture what black people are actually doing. The ideology needs to catch up with the reality of everyday life in which freedom of physical movement and greater social mobility are seen as a means of achieving a good life for the mass of black people and not merely measures of the extent to which that good life has been achieved.

The black good life is dependent upon blacks' acquiring access and agency within markets and audiences. Access and agency in turn depend on blacks' removing obstacles from their path. Sometimes those obstacles are merely attitudinal, the effect of stereotypical thinking. More often the obstacles are material, the result of stereotypical thinking manifested in patterns of behavior and structures of opportunity and dessert. Sometimes those ideological and material interests produce legal restraints that result in state-sanctioned discrimination and segregation. The good black life requires the good fight against biased and excessive constraints on leisure

at every level. The fight must stay focused on securing for the mass of black people freedom from discrimination and segregation in leisure, freedom from the obstacles that make living a good life impossible.

It bears noting, however, in light of blacks' past spiritual contributions to the creation of a more just and equal America, that enlargement of the black public sphere and blacks' accession to the good life will not only be good for blacks, it should be good for everyone. "[N]o society can prosper without centers of civility and public sociability."¹⁵¹ No society can prosper if such centers are predominately controlled by one segment or group. Real social life—where "social" refers to the whole public, not just to a few intimate acquaintances of the same ilk—requires that blacks control third spaces which they share with whites and others. At the same time, the attempt to open up public spaces which have been privatized by whites, the middle class, males, and heterosexuals must continue.

V. TESTING RESTRAINTS FOR THE IMPACT OF BLACK SOCIAL INEQUALITY AND THE IMPROPER PRIVATIZATION OF PUBLIC SPACE

Governmental restraints on black leisure may reflect black people's undeserved social inequality and result in the privatization and racialization of public space. Blacks have important interests that are jeopardized by such leisure constraints. In light of this, it is imperative that statutes, ordinances, regulations, and discretionary governmental actions adversely impacting black leisure be critically scrutinized. This admonition applies to official actors at all levels—legislators, policy makers and implementers, judges, and even street-level bureaucrats like police officers.

Some restraints have flaws that are easy to detect. If conduct is not prohibited when undertaken by a white or a middle-class person, then it should not be prohibited when undertaken by a black person or a person occupying a lower class position. But such situations are rare. Most cases require a more sophisticated analysis—one that reflects an understanding of black social inequality and the process by which public space is privatized and racialized, and that considers the relevance of leisure to blacks' ability to live a good life. Impermissible restraints penalize status, not conduct; confuse public social interaction with personal intimacy; promote the physical, social, and economic isolation of blacks; restrict access to public property in a way that is not justified by fiscal or environmental necessity; denigrate or ignore notions of morality and respectability that are

151. NASAW, *supra* note 97, at 256.

inconsistent with prevailing white, male, middle-class standards; and seek to control black workers' labor power by controlling their off-duty behavior.

The following questions readily come to mind regarding the appropriateness of restraints on black leisure, not as a matter of constitutional mandate, but as a means of assuring that public policy is fair and sensible:

Is the restraint directed at controlling specific conduct or is it directed at a status group, whether identified by age, class, gender, ethnicity, disability, or sexual orientation?

Does the restraint promote the physical, social, or economic isolation of blacks in general or of any identifiable black subgroup?

Does the restraint create the equivalent of a private property right in public property in an identifiable group of persons whose claim is based on prior usage or enforcement of proprietary prerogatives? Can the restraint be justified in the name of preserving a public asset for democratized use?

Does the restraint proceed on the assumption that leisure activity is intimate and personal? Does it prevent the mixing of citizens of various races, cultures, classes, genders, disabilities, or sexual orientations? Is the restraint inconsistent with a definition of "social" that refers to society as a whole?

Does the restraint proceed on the assumption that the regulated activity is immoral? By whose standards is morality judged? Does the restraint interfere with activities that are respectable according to standards that are not identified as white, male, and middle-class? Does the restraint denigrate the prized, long-held, or announced cultural norms of blacks or subgroups of blacks?

Does the restraint attempt to stifle competition by black enterprises or over black customers? To what extent does the restraint indirectly restrict the ability of black customers to pursue leisure outside of black enclaves?

Does the restraint attempt to control its subjects' labor power by controlling how black working people spend their time, energy, and money when off duty?

It is difficult to predict what impact such inquiries might have on the assessment of governmental restraints on black leisure as outlined in this Article, because the concerns require an exploration of the full context surrounding the creation and implementation of a governmental restraint on black leisure. It would appear, however, that restraints that rely on status distinctions, like juvenile curfews and residency requirements, should be

subject to heightened scrutiny. Constraints that work to physically isolate blacks, such as residency requirements, barriers to movement through white communities, and public transportation routing decisions, should be suspect as well. If conflicts over morality were an explicit consideration in assessing the propriety of a leisure restraint, hip-hop devotees might be freer to pursue their peaceful pleasures. Hip hop is loathed by many who do not appreciate the moral values they think it espouses. This has prompted various police action targeting the patrons of hip-hop clubs and dances. Of all the groups of black folks entitled to greater freedom from governmental leisure restraints according to the concerns raised in this Article, the hip-hop generation may be the most deserving. In many respects, it is their insistence on gaining access to, and agency in, the social and material mainstream through leisure pursuits (music, dance, art, movies, apparel) that makes examination of the propriety of governmental restraints on black leisure so imperative.

VI. CONCLUSION

The restraints to which black leisure is subject owe much to blacks' inferior social standing and to the privatization and racialization of public property. Spatial allocations dispense respectability and public resources at the same time that they respond to the existing distribution. Governmental restraints generally do not ameliorate blacks' social and material handicaps; they only make them worse.

Blacks must stand firm against any form of state-sanctioned segregation that isolates blacks socially and economically, and any form of state-sanctioned discrimination that reduces blacks' share of public resources. The toughest work in combating leisure restraints may not take place in courtrooms, legislative chambers, or bureaucratic offices. The fiercest fighting may occur on the social or cultural front. In some cases, culture is more powerful than law. When culture becomes embodied in the law, its strength may be virtually insurmountable. The culture wars cannot be abandoned on any supposition that victory can be won elsewhere, like in a court of law.

Blacks must tackle the issue of their social inequality head-on. They must demand respect on an equal basis with others and on terms that give due recognition to the worth of black leisure activities in its assorted gender, class, age, and sexual varieties. Blacks must defend leisure as an essential component of their right to live a good life.